No. 16-240
Title: Kentel Myrone Weaver, Petitioner
v.
Massachusetts
Docketed: August 24, 2016
Lower Ct: Supreme Judicial Court of Massachusetts
Case Nos.: (SJC-10932)
Decision Date: July 20, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 18 2016	Petition for a writ of certiorari filed. (Response due September 23, 2016)
Sep 6 2016	Waiver of right of respondent Massachusetts to respond filed.
Sep 23 2016	Brief amici curiae of Criminal Defense Attorneys of Michigan, et al. filed.
Sep 28 2016	DISTRIBUTED for Conference of October 14, 2016.
Oct 3 2016	Response Requested. (Due November 2, 2016)
Oct 27 2016	Order extending time to file response to petition to and including December 2, 2016.
Dec 2 2016	Brief of respondent Massachusetts in opposition filed.
Dec 20 2016	Reply of petitioner Kentel Myrone Weaver filed.
Dec 21 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 9 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED.
Feb 17 2017	SET FOR ARGUMENT ON Wednesday, April 19, 2017.
Feb 24 2017	Record requested from the Supreme Judicial Court of Massachusetts.
Feb 27 2017	Joint appendix filed. (Statement of costs filed.)
Feb 27 2017	Brief of petitioner Kentel Myrone Weaver filed.
Mar 1 2017	Record received from the Supreme Judicial Court of Massachusetts. The record is electronic.
Mar 3 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Mar 6 2017	Brief amici curiae of Reporters Committee for Freedom of the Press and Society of Professional Journalists filed.
Mar 6 2017	Brief amici curiae of American Civil Liberties Union and the ACLU of Massachusetts filed.
Mar 6 2017	Brief amicus curiae of Massachusetts Association of Criminal Defense Lawyers filed.
Mar 6 2017	Brief amici curiae of The Stein Center for Law and Ethics, et al. filed.
Mar 22 2017	CIRCULATED.
Mar 29 2017	Brief of respondent Massachusetts filed. (Distributed)
Apr 3 2017	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Apr 4 2017	Brief amici curiae of Arkansas, et al. filed. (Distributed)
Apr 5 2017	Brief amicus curiae of United States filed. (Distributed)
Apr 5 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Apr 5 2017	Letter received from Counsel for Respondents. (Distributed)

Apr 10 2017	Reply of petitioner Kentel Myrone Weaver filed. (Distributed)
Apr 13 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Gorsuch took no part in the consideration or decision of this motion.
Apr 19 2017	Argued. For petitioner: Michael B. Kimberly, Washington, D. C. For respondent: Randall E. Ravitz, Assistant Attorney General, Boston, Mass.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Jun 22 2017	Adjudged to be AFFIRMED. Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Ginsburg, Sotomayor, and Gorsuch, JJ., joined. Thomas, J., filed a concurring opinion, in which Gorsuch, J., joined. Alito, J., filed an opinion concurring in the judgment, in which Gorsuch, J., joined. Breyer, J., filed a dissenting opinion, in which Kagan, J., joined.
Jul 24 2017	MANDATE ISSUED.
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RECORD AND BRIEFS

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16-240

No.

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Because "most constitutional errors can be harmless," this Court has "adopted the general rule that a constitutional error does not automatically require reversal of a [criminal] conviction" and instead is subject to a "harmless-error analysis." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991). Among the constitutional violations subject to such analysis is ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668 (1984).

At the same time, the Court has identified a category of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. The consequences of such errors are "necessarily unquantifiable and indeterminate" and are therefore not susceptible to a harmless-error inquiry. *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993).

The question presented is whether a defendant asserting ineffective assistance that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts.

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Kentel Myrone Weaver respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (app., *infra*, 1a-41a) is reported at 54 N.E.3d 495. The opinion of the Suffolk Superior Court (app., *infra*, 42a-65a) is unreported.

JURISDICTION

The final judgment of the Supreme Judicial Court of Massachusetts was entered on July 20, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and to have the Assistance of Counsel for his defence.

STATEMENT

The lower courts are deeply divided over whether a criminal defendant must prove actual prejudice resulting from ineffective assistance of counsel when the consequence of the ineffective assistance is a structural trial defect. The conflict is the result of an acknowledged tension between "two competing lines of authority from [this] Court." *Winston* v. *Boatwright*, 649 F.3d 618, 622 (7th Cir. 2011).

On the one hand, the Court said in *Strickland* v. *Washington*, 466 U.S. 668 (1984), that in order to obtain relief on the basis of ineffective assistance of counsel, a criminal defendant must show not only that

his counsel's performance was deficient, but also "that the deficient performance prejudiced the defense." *Id.* at 687. That makes sense: A deficiency that makes no practical difference ordinarily should not be a basis for scrapping an entire trial and starting over from scratch.

On the other hand, the Court has identified a category of "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991). The "precise effects" of structural rights on the course of a trial are "indeterminate" and "unmeasurable." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). Such rights include (among others) the right to trial by jury, the right to a loyal attorney, the right to an impartial judge, and the right to a public trial; without observance of these rights, "a criminal trial cannot reliably serve its function." *Ibid.*

The lower courts are in conflict over how to reconcile these two doctrines when they intersect—that is, when a trial lawyer's incompetence results in a structural error. The First, Sixth, Seventh, and Eighth Circuits and the highest courts in Montana and the District of Columbia have held that the prejudice required by *Strickland* must be presumed when ineffective assistance leads to a structural error. But the Second, Third, Fifth, and Eleventh Circuits, as well as the highest courts of Georgia, Massachusetts, Michigan, Wisconsin, and Utah disagree.

This issue is not academic—in this case and all others like it, the defendant's entitlement to a new trial hangs in the balance. Here, petitioner's trial counsel incompetently failed to object to a two-day closure of the courtroom during jury empanelment—a textbook structural error. The lower court nevertheless denied

petitioner relief because he could not show actual prejudice from his lawyer's deficient performance—a holding that placed petitioner in the Catch-22 of having to prove something that the First Circuit has said is "impossible" to prove. *Owens* v. *United States*, 483 F.3d 48, 65 (1st Cir. 2007). In any of the six jurisdictions on the other side of the conflict, the outcome would have been different: prejudice would have been presumed, and petitioner would have gotten his new trial.

Further review is therefore imperative. The question presented arises frequently and is critically important in each case in which it arises. Moreover, this case presents a clean and fully-developed vehicle for addressing the question. The petition accordingly should be granted.

A. Structural errors and trial errors

This Court's cases recognize two broad categories of constitutional errors in criminal trials: trial errors (as to which prejudice must be demonstrated) and structural errors (as to which prejudice is presumed).

1. A trial error is a discrete error that "'occur[s] during presentation of the case to the jury.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) (quoting *Fulminante*, 499 U.S. at 307-308). Trial errors include admission of evidence obtained in violation of the Fourth Amendment (*Chambers* v. *Maroney*, 399 U.S. 42 (1970)), a prosecutor's comment on the defendant's silence in violation of the Fifth Amendment (*Chapman* v. *California*, 386 U.S. 18 (1967)), and a restriction on a defendant's right to cross-examine a witness in violation of the Sixth Amendment (*Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)). See *Fulminante*, 499 U.S. at 306-307 (collecting examples).

Trial errors like these are ordinarily isolated, and analyzing "'their effect on the factfinding process at trial'" is not especially difficult. *Sullivan*, 508 U.S. at 279 (quoting *Van Arsdall*, 475 U.S. at 681). It is easy enough to determine, for example, whether there was sufficient evidence to support a conviction separate and apart from evidence entered in violation of the Constitution. Such errors may "'be qualitatively assessed in the context of other evidence presented in order to determine'" whether the error affected the outcome. *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 308). Thus trial errors are generally understood to be "amenable to harmless-error analysis" and will not support a grant of relief unless the defendant can show that the violation "'contribute[d] to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24).

Ineffective assistance of counsel is typically a trial error. Thus, to obtain relief under *Strickland*, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

2. Structural errors are different in two ways. First, structural defects "'affect the framework within which the trial proceeds,'" and are not "'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309-310). Thus they strike at the fundamental fairness of the trial. "'Without [the] basic protections [of structural rights], a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Fulminante*, 499 U.S. at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). "'The harmless

error rule,'" which is focused on narrow, case-specific considerations, is inapt "'to gauge the great, though intangible, societal loss that flows'" from structural errors of this type. *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *People* v. *Jones*, 391 N.E.2d 1335, 1340 (N.Y. 1979)).

Second, structural errors simply "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. "[T]he usual harmless error analysis of looking at all the evidence and assessing the strength of the case simply does not answer the question of whether reversal is necessary in these cases, since the problem is not with the quantity or quality of evidence, but rather with some other [inherent] aspect of the process." Amy Knight Burns, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 Stan. L. Rev. 727, 733 (2012). The "precise effects" of structural errors are, in other words, "unmeasurable" and "unquantifiable" and "indeterminate." *Sullivan*, 508 U.S. at 281-282. Because "the effect of [a structural] violation cannot be ascertained," structural errors are "not amenable to harmless-error review." *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986).

Take, for example, the "Sixth Amendment right to counsel of choice." *Gonzalez-Lopez*, 548 U.S. at 148. "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Id.* at 149. The choice of attorney therefore does make a practical difference to the course of a trial. But "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings."

Id. at 150. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *Ibid.*

Take, as another example, the closure of a courtroom—the structural error at issue here. "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984). Thus, an open and public trial also makes a practical difference. But as with the right to counsel of choice, evaluating the effect of a courtroom closure on the outcome of a trial would entail a "speculative inquiry into what might have occurred in an alternate universe" (*Gonzalez-Lopez*, 548 U.S. at 150), implicating an endless chain of what-ifs and imponderable counterfactuals. "[U]nguided speculation" of this sort is not an acceptable basis "to judge intelligently the impact" of an error on a trial. *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

For these reasons, the consequences of structural errors are *presumed* to be prejudicial, requiring "automatic reversal." *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993).

B. The courtroom closure

Fifteen-year-old Germaine Rucker was shot and killed. App., *infra*, 1a. Petitioner, then just sixteen, was indicted and tried for the murder. App., *infra*, 1a.

During the two-day empanelment of the jury, "a court officer informed" interested members of the public "that the courtroom was 'closed' during the jury selection." App., *infra*, 50a. "[T]he courtroom remained closed to [all] members of the public for the duration of the [two-day] empanelment." *Id.* at 52a. Accord *id.* at 53a ("I find that a court officer * * * closed the court-

room to the defendant's family and other members of the public during the entirety of the empanelment.").

C. Proceedings below

1. Petitioner was convicted of murder and possession of an unlicensed firearm. App., *infra*, 42a. Following an unsuccessful direct appeal, he obtained new counsel and filed a motion for a new trial. The motion alleged among other things that trial counsel's failure to object to petitioner's Sixth Amendment right to a public trial amounted to ineffective assistance. *Ibid.*

Following a hearing that included live witness testimony, the trial court denied the motion. App., *infra*, 42a-65a. With respect to the relevant facts, the trial court found "that a court officer * * * closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment." *Id.* at 53a. It found further that "there was a full closure of the courtroom, rather than a partial closure" because there was "no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom." *Id.* at 57a "The sole reason for the closure," moreover, "was the crowded condition in the courtroom." *Id.* at 53a.

With respect to the law, the trial court recognized that court closures narrowly drawn to serve an "overriding interest" do not violate the Sixth Amendment. App., *infra*, 57a-58a (citing *Waller*, 467 U.S. at 48). But, the trial court held, "courtroom crowding falls short as a justification for the closure at issue here." *Id.* at 58a. "[E]ven if management of the crowded conditions in the courtroom rose to the level of 'overriding interest,'" the court went on, "the closure in this case was far broader than necessary in both time and

reach." *Id.* at 59a. Thus, the trial court concluded, "the closure in this case cannot be justified as a valid limitation of the defendant's Sixth Amendment rights," and "[a] structural error * * * occurred during the empanelment." *Id.* at 58a, 64a.

The trial court held further that "defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" and reflected "'serious incompetency.'" App., *infra*, 62a-63a. Defense counsel's performance was therefore deficient. *Ibid.* And for his part, petitioner was "unaware of his right to a public trial, [and] did not intentionally waive this right." App., *infra*, 62a. Indeed, he raised it at the first possible opportunity.

The trial court nevertheless denied petitioner's motion for a new trial because dictum appearing in *Commonwealth* v. *Dyer*, 955 N.E.2d 271 (Mass. 2011), "expressly declin[ed] to apply [a] 'structural error' analysis" to ineffective assistance claims involving structural errors and instead called for an actual prejudice inquiry. App., *infra*, 64a (citing *Dyer*, 955 N.E.2d at 280-281). Because "[t]he defendant has not offered any evidence or legal argument establishing prejudice," the court denied the motion. *Ibid.*

2. Petitioner appealed to the Supreme Judicial Court of Massachusetts. See Mass. Gen. Laws ch. 278, § 33E. While the appeal was pending, the court decided *Commonwealth* v. *LaChance*, 17 N.E.3d 1101 (Mass. 2014), cert. denied, 136 S. Ct. 317 (2015). The court in *LaChance* approved the dictum in *Dyer*, holding that criminal defendants may not avail themselves of "the presumption of prejudice that would otherwise apply to a preserved claim of structural error" in the context of

a *Strickland* claim predicated on a failure to raise the structural error. *Id.* at 1105-1107.

Two justices dissented in *LaChance*, stating that the majority's decision had "effectively foreclose[d] vindication of [a] constitutional right on collateral review, even in cases where trial counsel has rendered constitutionally deficient performance * * * and neither the defendant nor his counsel knowingly waived his right to a public trial." *LaChance*, 17 N.E.3d at 1107 (Duffly, J., dissenting). In the dissenting justices' view, "the very nature of a right to which presumptive prejudice attaches—such as the right to an open court—is that a showing of prejudice is not possible" as a practical matter. *Id.* at 1108-1109. Requiring proof of prejudice will therefore effectively preclude vindication of the right in virtually every case. *Ibid.*

3. Relying on *LaChance*, the Supreme Judicial Court affirmed the denial of a new trial in this case. App., *infra*, 1a-41a. Although the court agreed that "counsel's inaction" in failing to object to the closure "was the product of 'serious incompetency,'" it concluded that the trial court's denial of a new trial was not erroneous because petitioner "failed to show that trial counsel's conduct caused prejudice." *Id.* at 40a. Although the "violation of [petitioner's] Sixth Amendment right to a public trial constitutes structural error," the court reasoned, the trial court correctly "anticipated the rule announced in *LaChance*" and thus correctly denied relief because "the defendant * * * [had] failed to show that trial counsel's conduct caused prejudice warranting a new trial." *Id.* at 39a-40a (emphasis omitted).

REASONS FOR GRANTING THE PETITION

There is a deep, well-recognized conflict among the lower courts regarding the standard for determining prejudice when ineffective assistance of counsel leads to a structural violation. Some courts have concluded that prejudice must be presumed if the defendant establishes deficient performance resulting in a structural error. Other courts hold that actual prejudice must be established notwithstanding the unquantifiable consequences of structural errors. As a result, identically-situated criminal defendants are being treated fundamentally differently—some are being granted new trials, while others are not.

The courts holding that prejudice must be presumed have the better of the argument. Structural errors are defects in the trial mechanism itself, and their consequences are necessarily indeterminate. If defendants were required to demonstrate prejudice in ineffective-assistance cases involving structural errors, relief would effectively be impossible to obtain. The issue is important, frequently recurring, and cleanly presented for this Court's review. The petition should be granted.

A. There is a deep and acknowledged conflict over the question presented

Courts have widely acknowledged the conflict of authority implicated here. The Michigan Supreme Court, for example, has recognized the division among "the United States Courts of Appeals for the First and Eighth Circuits," which "have ruled that a structural error automatically satisfies the *Strickland* prejudice prong," and "the United States Court of Appeals for the Eleventh Circuit and the Georgia and Utah Supreme Courts," which "have held that an ineffective assis-

tance of counsel claim premised on a structural public trial right violation still requires a defendant to demonstrate actual prejudice." *People* v. *Vaughn*, 821 N.W.2d 288, 307-308 (Mich. 2012).

Recognizing the same division of authority, the Massachusetts Supreme Judicial Court stated in *LaChance* that it "do[es] not agree with the reasoning of [the First Circuit] in this context" and instead is "more aligned with that of the United States Court of Appeals for the Eleventh Circuit." *LaChance*, 17 N.E.3d at 1106. Similarly, Judge Kethledge of the Sixth Circuit recognized that although the Sixth Circuit's answer to the question presented comports with a decision of the First Circuit, it "directly conflicts" with a decision of the Eleventh Circuit. See *Johnson* v. *Sherry*, 586 F.3d 439, 449 (6th Cir. 2009) (Kethledge, J., dissenting).

In fact, the split is far deeper than any of these courts has acknowledged: Whereas six circuits and state high courts hold that actual prejudice must be presumed in cases like this one, nine circuits and state high courts hold that prejudice may not be presumed. In the face of such an entrenched conflict, this Court's intervention is desperately needed.

1. Six circuits and state high courts hold that actual prejudice must be presumed in cases like this one

Four courts of appeals and two state high courts have held—contrary to the ruling below—that when a defendant claims ineffective assistance of counsel resulting in a structural error, the reviewing court must apply the same presumption of prejudice that governs the structural error on direct review.

In the **First Circuit**, "a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007). Citing this Court's determinations that it is impossible to identify prejudice resulting from structural errors, including violations of a defendant's right to a public trial, the First Circuit concluded that it would "not ask defendants to do what the Supreme Court has said is impossible," by requiring that they show prejudice where ineffective assistance of counsel leads to a structural error. *Id.* at 65. "If the failure to hold a public trial is structural error, and it is impossible to determine whether a structural error is prejudicial, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." *Id.* at 66 (citations omitted).

The **Sixth Circuit** reached the same conclusion in *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), with respect to a state habeas petitioner's claim that his counsel had been constitutionally ineffective in failing to object to a courtroom closure during testimony at trial. *Id.* at 445. The court ordered an evidentiary hearing and observed that, under *Strickland*, a habeas petitioner who "establish[es] that counsel's performance was deficient" is also "required to demonstrate that he was prejudiced by the error." *Id.* at 446-447. The court held, however, that if the defendant on remand succeeded in showing that his trial counsel's performance was deficient and resulted in a structural denial of the defendant's public trial right, "prejudice

would be presumed" for purposes of the *Strickland* analysis. *Id.* at 447.[1]

The **Seventh Circuit** took a similar approach in *Winston* v. *Boatwright*, 649 F.3d 618 (7th Cir. 2011). There, the court of appeals held that "Winston's lawyer's performance was constitutionally inadequate," resulting in a jury-composition error under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). 649 F.3d at 632. But the court noted that the interplay between *Batson* and *Strickland* presented "a problem: while a direct *Batson* claim would be viewed as a structural error and thus not subject to a harmless-error rule, a *Strickland* argument requires an examination of prejudice." *Ibid.* After weighing the competing considerations and recognizing that "[u]nconstitutional juror strikes, like other structural errors, create the kind of problem that 'def[ies] analysis by harmless error standards,'" the court there held that "prejudice automatically flows from a deliberate *Batson* violation" in the context of a claim for ineffective assistance of counsel under *Strickland*. *Id.* at 633.[2]

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[1] *Johnson* involved a federal habeas petitioner challenging a state-court conviction. That posture required the petitioner to make "two showings of prejudice"—one called for by *Strickland* and the other required by *Coleman* v. *Thompson*, 501 U.S. 722 (1991), under which a habeas petitioner must show cause and prejudice to overcome a state procedural default (including waiver caused by ineffective assistance). 586 F.3d at 447 n.7. The Sixth Circuit agreed with the First Circuit's conclusion in *Owens* that the two prejudice requirements "overlap" and thus addressed them as one and the same. *Ibid.*

[2] The court in *Winston* ultimately denied relief because the case involved review of a state-court judgment under Section 2254, and the court could not say that this Court had clearly established the structural nature of *Batson* errors at the time the state rendered its judgment. 649 F.3d at 633-634.

The **Eighth Circuit** has adopted the identical rule: "when counsel's deficient performance causes a structural error," that court "will presume prejudice under *Strickland*." *McGurk* v. *Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998). Defense counsel in *McGurk* had failed to recognize that his client was entitled to a trial by jury, and as a result deprived him of that right. The Eighth Circuit broadly addressed "structural error," including the right to a public trial, and held that "failure on the part of counsel to ensure that mechanisms fundamental to our system of adversarial proceedings are in place cannot * * * constitute harmless error." *Id.* at 475 & n.5. The Eighth Circuit thus held that the state court in that case had "erred in requiring a showing of actual prejudice" and remanded "with instructions to issue the writ of habeas corpus unless, within a reasonable time to be designated by the district court, the state affords petitioner a new trial." *Id.* at 475.[3]

Two state courts have reached the same conclusion as the First, Sixth, Seventh, and Eighth Circuits. In *Littlejohn* v. *United States*, 73 A.3d 1034 (D.C. 2013), the **District of Columbia Court of Appeals** held that prejudice must be presumed for *Strickland* purposes when the ineffective assistance permits a violation of the public trial right. The court reasoned in particular that, because prejudice is "impossible to identify" when

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[3] The Eighth Circuit more recently affirmed in a court-closure case that "under [its] precedent, 'when counsel's deficient performance causes a structural error, [it] will presume prejudice under *Strickland*.'" *Addai* v. *Schmalenberger*, 776 F.3d 528, 535 (8th Cir.) (quoting *McGurk*), cert. denied *sub nom. Addai* v. *Braun*, 136 S. Ct. 73 (2015). Like the Seventh Circuit in *Winston*, the Eighth Circuit denied relief in *Addai* because the case arose under Section 2254, and the court could not say that the state court's particular error violated "clearly established federal law" under this Court's precedents. *Id.* at 535-536.

the error is structural, requiring the defendant to prove prejudice "as a result of trial counsel's waiver of his public trial right would be inconsistent with the Supreme Court's holdings that prejudice is presumed when the constitutional error is a structural defect." *Id.* at 1043.

The **Montana Supreme Court** reached the same conclusion in *Montana* v. *Lamere*, 112 P.3d 1005 (Mont. 2005). There, the court concluded that "defense counsel's performance was deficient" because he permitted a biased juror to be seated and thereby failed to "secure an impartial jury." *Id.* at 1013. Because the upshot of "counsel's deficient performance" was the introduction of a structural error, the court reasoned, "the integrity of the entire trial" was "undermined," and "prejudice is therefore presumed" for purposes of "the second prong of the *Strickland* test." *Id.* at 1013-1014. *Accord id. at 1013* ("prejudice is adequately established because a structural error existed, and such errors are presumptively prejudicial"). The court thus concluded that the petitioner had "satisfied both prongs of the *Strickland* test" because "[c]ounsel's failure to ensure that the jury was impartial" was both "deficient" and "produced a structural error, and thus prejudice is presumed." *Id.* at 1014.

Against this backdrop, there can be no doubt that petitioner here would have been granted a new trial if his motion had been filed in the First, Sixth, Seventh, or Eighth Circuits or the courts of the District of Columbia or Montana.

2. *Nine circuits and state high courts, including the court below, hold that prejudice may not be presumed*

Other lower courts of appeals have reached the same conclusion as the Massachusetts Supreme Judicial Court did in this case, holding that a criminal defendant must demonstrate actual prejudice when a structural-error claim is raised as part of a claim of ineffective assistance of counsel.

The **Eleventh Circuit**, for example, rejected an ineffective assistance claim based on defense counsel's failure to object at trial to a partial courtroom closure, holding that the defendant "has not established that he was prejudiced by his trial counsel's failure to object to the closure of the courtroom." *Purvis* v. *Crosby*, 451 F.3d 734, 738 (11th Cir. 2006). "If counsel had objected in a timely fashion" to the courtroom closure, the court reasoned, "there is no reason to believe that would have changed the victim's testimony." *Id.* at 738-739. The court thus rejected the argument that prejudice should be presumed because of the structural nature of the error at trial:

> It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance claim.

Id. at 740. Thus, in the Eleventh Circuit's view, it could not "dispense with the prejudice requirement for attorney error * * * without defying the Supreme Court's clear holding" in *Strickland*. *Id.* at 741.

The **Second, Third, and Fifth Circuits** have reached the same conclusion (*United States* v. *Gomez*, 705 F.3d 68, 79-80 (2d Cir. 2013); *Palmer* v. *Hendricks*, 592 F.3d 386, 397-98 (3d Cir. 2010); *Virgil* v. *Dretke*, 446 F.3d 598, 612 (5th Cir. 2006)), as have the courts of last resort in **Georgia, Michigan, Wisconsin, and Utah**. See *Reid* v. *State*, 690 S.E.2d 177, 180-181 (Ga. 2010); *People* v. *Vaughn*, 821 N.W.2d 288, 306-308 (Mich. 2012); *State* v. *Pinno*, 850 N.W.2d 207, 230-231 (Wis. 2014); *State* v. *Butterfield*, 784 P.2d 153, 157 (Utah 1989).[4]

* * *

The courts of appeals and the state high courts are thus deeply divided on the question presented, and the conflict cannot resolve itself. Worse, the division of authority here puts the First Circuit in conflict with Massachusetts, the Sixth Circuit in conflict with Michigan, and the Seventh Circuit in conflict with Wisconsin. In each of these States, identical constitutional claims are being treated one way in state court (new trials are denied) and another way in federal

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[4] The Ninth Circuit is internally conflicted on the issue. In *Styers* v. *Schriro*, 547 F.3d 1026 (9th Cir. 2008), the court explained that when an ineffective assistance claim "directly implicates [a structural error like] the impartiality of the jury," no "additional or separate showing of prejudice would appear necessary" to establish a *Strickland* violation. *Id.* at 1030 n.5. Yet the court had earlier held that defendants must demonstrate actual prejudice in cases like this. See *Vansickel* v. *White*, 166 F.3d 953, 958-959 (9th Cir. 1999). Judge Reinhardt dissented in *Vansickel*, explaining that "application of such an actual prejudice standard constitutes an impossibility" in ineffective-assistance cases involving structural errors because "the error is one that we have clearly stated is not susceptible of actual prejudice analysis." *Id.* at 961. The apparent conflict within the Ninth Circuit's precedents counsels further in favor of this Court's intervention.

court (new trials are granted). Only this Court can resolve this stark and untoward conflict.

B. *Strickland*'s prejudice requirement is presumptively satisfied when ineffective assistance results in a structural error

Review is furthermore warranted because the decision below is wrong. Requiring a defendant to demonstrate prejudice from the violation of his public trial right is inconsistent with this Court's precedents concerning the unique nature of "structural" errors.

1. Structural errors, unlike trial errors, "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. Trial errors may "be quantitatively assessed in the context of other evidence * * * in order to determine" whether the error affected the outcome. *Id.* at 308. Structural rights are "markedly different," because they are "defects in the constitution of the trial mechanism" itself. *Id.* at 309. The consequences of denials of structural trial rights are therefore "necessarily unquantifiable and indeterminate." *Sullivan*, 508 U.S. at 282. If defendants were required to make a showing of prejudice in cases involving structural errors, therefore, relief would be impossible to obtain, "for it would be difficult to envisage a case in which [they] would have evidence available of specific injury.'" *Waller*, 467 U.S. at 50 n.9 (quoting *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3d Cir. 1969) (en banc)).

That is particularly true in cases involving a denial of the right to a public trial. The public trial right serves a vital function in ensuring that "judge and prosecutor carry out their duties responsibly" and "encourag[ing] witnesses to come forward and discourag[ing] perjury." *Waller*, 467 U.S. at 46. More general-

ly, "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Estes* v. *Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring). While these consequences of a public trial are essential to fundamental fairness—and just as relevant to jury empanelment as to trial itself (*e.g.*, *United States* v. *Negron-Sostre*, 790 F.3d 295 (1st Cir. 2015))—they are also undeniably "intangible," often a "matter of chance," and thus impossible to quantify and prove. *Waller*, 467 U.S. at 49 n.9.

The Court's conclusion that structural errors are by definition errors that "defy" harmless error review applies equally in the ineffective assistance context. Such an analysis would involve a "speculative inquiry into what might have occurred in an alternate universe," just as it does on direct review. *Gonzalez-Lopez*, 548 U.S. at 150.[5] Defendants would be obliged to carry a burden of proving counterfactual details that this Court has recognized is "impossible to know" and "impossible * * * to quantify." *Ibid.* Absent a presumption of prejudice, therefore, a significant category of trial counsel errors would, as a practical matter, be exempted entirely from the Sixth Amendment's critical protection of effective assistance of counsel.

2. No feature of collateral review justifies a different standard for structural errors. In *LaChance*, the Massachusetts Supreme Judicial Court invoked the importance of finality in arguing against a presump-

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[5] Even if it were otherwise, while "[i]t is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial," it "does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Gonzalez-Lopez*, 548 U.S. at 145 (2006).

tion of prejudice. 17 N.E.3d at 1106. To be sure, finality is an important interest, but *Strickland* itself identifies certain contexts in which prejudice is presumed—such as when defense counsel "is burdened by an actual conflict of interest." 466 U.S. at 692. That is because, "it is difficult to measure the precise effect on the defense" of conflicted representation. *Ibid.* The same conclusion applies with respect to the Sixth Amendment right to a public trial.

The lower court, in *LaChance*, also expressed concern that defense counsel could "'harbor error as an appellate parachute'" by failing to object and then invoking an unpreserved "structural" error to obtain a new trial. 17 N.E.3d at 1107 (quoting *Vaughn*, 821 N.W.2d at 308). But a court applying the deficient performance prong of *Strickland* must consider whether the failure to object was a tactical decision, and therefore not constitutionally defective representation, in determining whether counsel's "identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689-690. In cases where counsel knowingly decline to raise particular issues for tactical reasons, in other words, there would be no deficient performance to begin with.

C. This case is a perfect vehicle for addressing the question presented

Review is especially appropriate here because this case is a pristine vehicle for addressing the question presented. The trial court made detailed findings of fact and issued thorough conclusions of law concerning the courtroom closure and petitioner's counsel's deficiency. The Supreme Judicial Court accepted the trial court's findings and disposed of the cases as a pure matter of law.

First, the lower courts found that the courtroom was fully closed for two entire days of jury empanelment. The trial court heard testimony from multiple witnesses establishing that "a court officer told [petitioner's mother] that the courtroom was 'closed for jury selection'" during the two days of *voir dire*. App., *infra*, 48a, 50a. Thus, according to the trial judge, "the courtroom remained closed to [all] members of the public for the duration of the empanelment." *Id.* at 52a. Accord *id.* at 53a ("I find that a court officer * * * closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment."). The Supreme Judicial Court agreed. See *id.* at 39a.

The trial court held, moreover, that "there was a full closure of the courtroom, rather than a partial closure." App., *infra*, 57a. There was "no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom." *Ibid.* The Supreme Judicial Court, for its part, again "agree[d] with the * * * conclusion that the closure was a full, rather than partial, closure of the court room." *Id.* at 39a.

Second, the lower courts held that this was a structural error. The trial court found that "[t]he sole reason for the closure was the crowded condition in the courtroom" (app., *infra*, 53a) but concluded that "courtroom crowding falls short as a justification for the closure at issue here" (*id.* at 58a). "[E]ven if management of the crowded conditions in the courtroom rose to the level of 'overriding interest,'" moreover, "the closure in this case was far broader than necessary in both time and reach." *Id.* at 59a. Thus, the trial court concluded, "the closure in this case cannot be justified as a valid limitation of the

defendant's Sixth Amendment rights" (*id.* at 58a) and "[a] structural error * * * occurred during the empanelment" (*id.* at 64a).

The Supreme Judicial Court agreed that "[a] violation of the Sixth Amendment right to a public trial constitutes structural error" and accepted the trial court's well-reasoned conclusion that such a violation occurred in this case. *Id.* at 39a (emphasis omitted).

Finally, the lower courts found that the performance of petitioner's lawyer during the trial was constitutionally deficient. The trial court held that "defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" and reflected "'serious incompetency.'" App., *infra*, 62a-63a. Defense counsel's performance was therefore deficient. *Ibid.* Nor did petitioner waive this right. He was "unaware of his right to a public trial, [and] did not intentionally waive this right." App., *infra*, 62a. On the contrary, he raised it at the first possible opportunity.

Against this detailed backdrop, the sole basis on which the trial court denied petitioner's motion for a new trial—and the sole basis on which the Supreme Judicial Court affirmed the denial—was the legal conclusion that petitioner was not entitled to a presumption of prejudice and (unsurprisingly) that he could not establish actual prejudice. App., *infra*, 40a, 64a. Declining to overturn *LaChance*, the Supreme Judicial Court therefore affirmed the order denying petitioner a new trial. *Id.* at 40a-41a.

The question presented is thus outcome-determinative here. Petitioner would have been entitled to a new trial if he had pressed his claim in the First, Sixth,

Seventh, or Eighth Circuits or the courts of the District of Columbia or Montana. Because—and *only* because—his claim arose in a jurisdiction on the other side of the split, he was denied that right. Such inconsistency in the application of federal constitutional law should not be tolerated.[6]

D. The question presented is important

The clean presentation of a question of constitutional law over which the lower courts are divided is basis enough for granting the petition. Yet review here is all the more appropriate because proper resolution of the question presented is a matter of tremendous practical importance.

To begin with, the issue arises with considerable frequency. The number of lower appellate courts that have weighed in on the issue—fifteen at last count—is evidence enough of that. And a simple (and surely underinclusive) Westlaw search shows that the issue has arisen in many federal district court cases over the

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[6] We are mindful that the Court has denied review of the question presented in several recent cases. But this case—which involves clearly deficient performance resulting in a clear structural error—includes none of the substantial obstacles to review that were present in those other cases. See, *e.g.*, *Commw.* v. *Jackson*, 28 N.E.3d 437 (Mass. 2015), cert. denied, 136 S. Ct. 1158 (2016) (no Sixth Amendment violation or ineffective assistance); *Commw.* v. *Penn*, 36 N.E.3d 552 (Mass. 2015), cert. denied, 136 S. Ct. 1656 (2016) (no determination of waiver or ineffective assistance); *Wilder* v. *United States*, 806 F.3d 653, 660 (1st Cir. 2015), cert. denied, 136 S. Ct. 2031 (2016) (assistance not deficient); *LaChance*, *supra*, cert. denied 136 S. Ct. 317 (2015) (no determination of waiver or ineffective assistance); *Commw.* v. *Alebord*, 4 N.E.3d 248 (Mass. 2014), cert. denied 34 S. Ct. 2830 (2014) (assistance not deficient); *Commw.* v. *Morganti*, 4 N.E.3d 241 (Mass. 2014), cert. denied 135 S. Ct. 356 (2014) (no Sixth Amendment violation or ineffective assistance).

past several years, to say nothing of state trial court cases.[7]

Beyond its frequent recurrence, the question presented is a matter of crucial importance in every case in which it arises. Structural errors are a "highly exceptional category" of constitutional violations that "undermine the fairness of a criminal proceeding as a whole." *United States* v. *Davila*, 133 S. Ct. 2139, 2149 (2013). Because any case in which the issue is outcome determinative necessarily involves a structural error, every such case implicates principles of fundamental fairness that are essential to the just and proper

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[7] See, *e.g.*, *Galloway* v. *Wenerowicz*, 2016 WL 2894476, at *6 & n.4 (W.D. Pa. 2016), report and recommendation adopted, 2016 WL 2866765 (W.D. Pa. 2016); *Lee* v. *Haas*, 2016 WL 3475324, at *9 (E.D. Mich. 2016); *Martin* v. *United States*, 2016 WL 3676590, at *4 (N.D. W. Va. 2016); *Allen* v. *Perry*, 2015 WL 3917084, at *6 (S.D. Ga. 2015), report and recommendation adopted, 2015 WL 5116778 (S.D. Ga. 2015); *United States* v. *Aguilar*, 82 F. Supp. 3d 70, 87 & n.18 (D.D.C. 2015); *Brown* v. *Price*, 2015 WL 403173, at *8 (N.D. Ala. 2015); *Juniper* v. *Zook*, 117 F. Supp. 3d 780, 792 & n.7 (E.D. Va. 2015); *Harrison* v. *Woods*, 2014 WL 6986172, at *8 (E.D. Mich. 2014); *Porter* v. *Tribley*, 2014 WL 6632123, at *8 (E.D. Mich. 2014); *Christian* v. *Hoffner*, 2014 WL 5847600, at *11 (E.D. Mich. 2014); *Alvarez* v. *United States*, 2014 WL 29383, at *4-5 (D.S.C. 2014); *Brown* v. *Thaler*, 2013 WL 3455713, at *3 & n.3 (N.D. Tex. 2013); *Hestle* v. *United States*, 2013 WL 1147712, at *6 (E.D. Mich. 2013); *Drain* v. *Woods*, 902 F. Supp. 2d 1006, 1026 (E.D. Mich. 2012); *Espada* v. *Sec'y, DOC*, 2011 WL 4459169, at *13-15 (M.D. Fla. 2011); *United States* v. *Kaufman*, 2011 WL 3299937, at *7 (D. Kan. 2011); *Strong* v. *Roper*, 2011 WL 2600241, at *14 (D. Mo. 2011); *Price* v. *Sec'y, Dep't of Corr.*, 2011 WL 2561246, at *8 (M.D. Fla. 2011); *Zimmerman* v. *Davis*, 2011 WL 1233311, at *14 (E.D. Mich. 2011); *Stevens* v. *Beard*, 2010 WL 8266292, at *6 n.3 (E.D. Pa. 2010); *Torres* v. *McNeil*, 2010 WL 5849880, at *19-21 (N.D. Fla. 2010); *Charleston* v. *McDonough*, 2010 WL 780200, at *8 (N.D. Fla. 2010); *Berryman* v. *Wong*, 2010 WL 289181, at *5-6 (E.D. Cal. 2010).

functioning of the criminal justice system. See *Negron-Sostre*, 790 F.3d 295 at 306 (a courtroom closure during jury empanelment "seriously impair[s] the fairness, integrity, or public reputation of the proceedings"). The Supreme Judicial Court openly acknowledged that the basic rules of fairness guaranteed by the Sixth Amendment were violated in this case, and yet it refused to grant relief all the same.

The Eleventh Circuit's decision in *Purvis* and the Utah Supreme Court's decision in *Butterfield* are models of an equally troubling outcome. In those cases, the courts declined even to decide whether counsel had rendered deficient performance, reasoning that it would not make a difference in light of the impossibility of proving the prejudice of a structural error. That is a perverse result. If the structural errors in *Purvis* or *Butterfield* (or this case) had been preserved by competent counsel and raised on direct appellate review, the defendants would have been entitled to new trials automatically, as a matter of law. But because they instead suffered the *added* insult of deficient trial counsel who failed to object to the error, their structural injuries became irrelevant according to those courts. That makes no sense. Further review is manifestly warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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August 2016

APPENDICES

APPENDIX A

Commonwealth *vs.* Kentel Myrone Weaver

SJC-10932

SUPREME JUDICIAL COURT OF MASSACHUSETTS

January 12, 2016, Argued
July 20, 2016, Decided
July 29, 2016, Corrected

Present: Gants, C.J., Spina, Cordy, Duffly, & Lenk, JJ.

OPINION

Cordy, J. On the evening of August 10, 2003, fifteen year old Germaine Rucker was shot and killed. The defendant, who was sixteen at the time of the shooting, subsequently admitted to committing the murder after prolonged questioning by the police and by his mother.

Prior to trial, the defendant filed a motion to suppress his statements to the police. That motion was denied following an evidentiary hearing. In 2006, a jury convicted the defendant of murder in the first degree on the theory of deliberate premeditation. He was also convicted of the unlicensed possession of a firearm. In 2011, the defendant filed a motion for a new trial under *Mass. R. Crim. P. 30*, as appearing in 435 Mass. 1501 (2001), claiming that he was denied the effective assistance of counsel in two respects: first, that counsel failed to adequately investigate the

defendant's claim that his statements to police were coerced because counsel did not consult with a mental health expert or present expert testimony about the voluntariness of those statements; second, that counsel failed to object to the closure of the court room during *jury empanelment in violation of the defendant's right* to a public trial under the *Sixth Amendment to the United States Constitution.* The motion was bifurcated, and different judges considered, and ultimately rejected, the claims. The denial of the motion was *consolidated with the defendant's direct appeal.*

In his appeal, the defendant asks us to expand our *rule requiring the corroboration of extrajudicial* statements as it applies to juvenile confessions pursuant to our extraordinary power under *G. L. c. 278, § 33E.* He also claims error in (1) the denial of his motion to suppress; (2) the denial of his motion for a *new trial; and (3) the denial of his motion for a directed* verdict on the firearms charge. We affirm the defendant's convictions and decline to grant relief under *G. L. c. 278, § 33E.*

1. *Facts.* We recite the facts in the light most favorable to the Commonwealth, reserving certain details for our analysis of the legal issues raised on appeal.

On August 10, 2003, the victim went to Wendover Street to sell some small jewelry charms to a woman and her children. After the transaction, the woman reentered her home, and the daughter remained outside. The woman heard two gunshots. She stepped back out of the doorway and saw the victim lying in the street on top of his bicycle. The bag in which he had carried the jewelry was gone. The woman went back inside and telephoned 911.

The daughter testified that, just before the shooting, she noticed a group of males of varying ages gathered at the top of Dudley and Wendover Streets. The group rushed toward the victim, who threw his bag on the ground. They began to fight. An older member of the group, who appeared to be about thirty years of age and was wearing a straw hat, threw the first punch. A younger member of the group, who appeared to be about fifteen years of age and was wearing jean shorts and a white "doo-rag," picked up the victim's bag and ran toward Dudley Street. The daughter ran up the steps toward her front door and heard two gunshots fired in quick succession.

A third witness, who lived on nearby Humphreys Street, was sitting outside on his second-floor porch when he heard gunshots from the direction of Wendover Street. He then saw a young black man run down Humphreys Street away from Dudley Street. The young man wore dark jeans and was trying to pull off a dark shirt, under which he wore a white t-shirt. The young man stumbled, hopped, and pulled a pistol from his pants leg. The pistol had a flat handle and a round silver barrel. As he did so, the baseball cap he was wearing fell off of his head. The cap was collected by the police later that evening.

The cap was a Detroit Tigers baseball cap, with a stitched white "D" on the front and what appeared to be hand-drawn or painted white "D" letters on the sides. The police had seen the defendant wearing a cap matching the same description when they spoke to him approximately two weeks before the victim was murdered. Deoxyribonucleic acid (DNA) matching the defendant's DNA profile was found on the hatband. An analyst testified that the possible contributors to the DNA profile found on the hatband were one in 40

billion Caucasians, one in 1.6 billion African-Americans, and one in 65 billion Southeastern Hispanics.

A ballistics expert testified that shell fragments recovered from the victim were consistent with having been fired from a revolver and not a semiautomatic weapon. A revolver has a round barrel, consistent with the description of the handgun in the possession of the fleeing suspect, and does not eject shell casings. No shell casings were recovered from Wendover Street.

When emergency medical services arrived at the scene, the victim showed no signs of life. He had a bleeding head wound with brain matter visible and a second wound to his lower right back. The medical examiner who performed the autopsy on the victim determined that the cause of death was the two gunshot wounds.

At trial, there was a great deal of testimony regarding the investigation leading up to the incriminating statements that the defendant made to police, especially his admission, made after discussing the particulars with his mother, that he "shot the [victim]." The defense strategy was to claim that the defendant's statements were involuntary, and the result of coercion by a combination of lengthy questioning first by police and then by his mother, Iris Weaver (Weaver). We leave the details concerning the questioning of the defendant and the resultant incriminating statements to the discussion of the defendant's motion for a new trial, *infra*, as the trial testimony of the involved police officers and the defendant's mother, viewed in the light most favorable to the Commonwealth, are substantively identical to the testimony given at the evidentiary hearing on the motion.

At the conclusion of the trial, a humane practice instruction was given to the jury. The judge instructed the jury that the Commonwealth bore the burden of proving beyond a reasonable doubt that the defendant made his statement to the police "voluntarily, freely, and rationally." The judge further stated:

> "In order for a statement of a defendant to be voluntary, it must not, in any way, be coerced by physical intimidation or psychological pressure. Under the law of the Commonwealth of Massachusetts, a statement may be coerced not only by law enforcement officials but also by a private citizen. That is, coercion—You may find that the defendant was coerced. Let me put it this way, coercion may occur not only by law enforcement officials, but in order to be coercion, it may also be caused by a private citizen. A statement made by a defendant is not voluntary if it is psychologically coerced. Therefore, if you find that the statement made by the defendant was coerced by his mother or any other person, you may not consider that statement in reaching a verdict."

During deliberations, the jury asked for a legal definition of "psychological coercion." After receiving the question, the court adjourned for the day. Neither the judge nor counsel located any case law defining the term before court reconvened the next morning. The judge then repeated his original instructions to the jury, adding that the jurors should "give the term psychological coercion its plain and ordinary meaning as you understand it. But I will tell you that psychological coercion refers to inappropriate or inordinate psychological pressure." The jury subsequently convicted the defendant.

2. *Discussion.* a. *Corroboration rule.* In *Commonwealth v. Forde, 392 Mass. 453, 458, 466 N.E.2d 510 (1984)*, we announced the corroboration rule, which "requires corroboration that the underlying crime was in fact committed, thus preventing convictions against persons who have confessed to fictitious crimes." *Commonwealth v. DiGiambattista, 442 Mass. 423, 430, 813 N.E.2d 516 (2004)*, citing *Forde, supra at 458.* In *DiGiambattista*, we declined to expand the rule to require corroboration that a defendant was the actual perpetrator of the crime, or to require a showing that a confession is reliable under the circumstances in which it was given. *DiGiambattista, supra at 431-432.* Acknowledging the phenomenon of false confessions, we concluded that the problem is best addressed through the "strict analysis of the circumstances of [an] interrogation as they affect the voluntariness of a defendant's statement." *Id. at 432.*

On appeal, the defendant asks us to reconsider expanding the corroboration rule as it applies to juvenile confessions in light of research that juveniles are more likely than adults to confess to crimes they did not commit—research to which no citation is provided. He argues that his case illustrates the need for an expanded rule requiring additional evidence that the accused perpetrated the crime because although there is no question that a crime occurred—satisfying *Forde*—there is no evidence, aside from the defendant's confession, linking him to it.

We decline to expand the rule on this record. The defendant fails to articulate why our practice of rigorously examining the voluntariness of a defendant's confession is an inadequate prophylactic measure against the use of false confessions in securing a

conviction. Indeed, even if we were to expand the rule, it would not aid the defendant's case. In addition to the defendant's admission, the Commonwealth presented evidence at trial linking the defendant to the murder, including testimony that (1) a young man was seen fleeing from the scene of the shooting; (2) the young man had a firearm fitting the description of a revolver in his possession as he fled; (3) the young man was wearing a distinctive baseball cap, which fell to the ground; (4) the cap belonged to the defendant; and (5) the victim and the defendant were known to each other.

The defendant also asks for unspecified relief under *G. L. c. 278, § 33E*, on the basis that the jury could not properly assess the voluntariness of his admission in this case. We disagree, as the jury heard extensive evidence about the circumstances surrounding the defendant's statements, and were properly instructed on the humane practice rule. We therefore decline to grant relief under *§ 33E*.

b. *Motion to suppress the defendant's statements.* The defendant next asserts error in the denial of his pretrial motion to suppress his statements to the police based on his claim that they were involuntary and coerced. The Commonwealth argues that the defendant waived this argument by failing to brief the issue in accordance with *Mass. R. A. P. 16 (a) (4)*, as amended, 367 Mass. 921 (1975).[1] In his brief, the defendant does

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[1] *Rule 16 (a) (4) of the Massachusetts Rules of Appellate Procedure*, as amended, 367 Mass. 921 (1975), requires that the appellant's argument "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. . . . The appellate court need not pass upon questions or issues not argued in the brief."

not dispute the factual findings of the judge who heard the motion (pretrial motion judge) as to the credibility of witnesses, but the defendant states that he "does dispute the conclusions of law." The defendant then states that he incorporates by reference the authorities cited in the defendant's application to a single justice in the county court for leave to prosecute an interlocutory appeal "in the interests of judicial economy and brevity." The defendant additionally cites to authorities apparently not cited in the prior filings, but does not provide complete citations or any argument as to why those authorities undermine the rulings of the pretrial motion judge.

We agree with the Commonwealth that the defendant's treatment of this issue in his brief does not rise to the level of appellate argument required by *rule 16 (a) (4)* and is therefore technically waived.[2] However, review under *G. L. c. 278, § 33E*, requires us "to consider all issues apparent from the record, whether preserved or not." *Commonwealth v. Randolph, 438 Mass. 290, 294, 780 N.E.2d 58 (2002)*. Thus, we review the denial of the motion to suppress, and if there was error, we determine whether the error created a substantial likelihood of a miscarriage of justice in the verdict. *Id.*

"In reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his ultimate findings and conclusions of law.'" *Commonwealth v. Scott, 440 Mass. 642, 646, 801 N.E.2d 233*

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[2] In his reply brief and at oral argument, the defendant argued it was not his intention to waive this claim, but rather incorporated the authority contained in the trial pleadings in the interest of "judicial economy." This contention is unavailing.

(2004), quoting *Commonwealth v. Jimenez, 438 Mass. 213, 218, 780 N.E.2d 2 (2002).*

Following an evidentiary hearing, the pretrial motion judge found the following facts that we conclude are supported by the evidence. In investigating the victim's murder, the detectives initially brought the defendant's older brother, Cassim, to the police station for questioning because they had received information that he had been seen wearing a blue Detroit Tigers baseball cap, similar to the one found near the scene of the shooting. Apparently satisfied that Cassim was not involved in the shooting, he was subsequently dropped off at home by a police officer after the interview. Weaver was upset that Cassim had been taken to the police station.

After speaking with Cassim, the focus of the investigation shifted to the defendant. O'Leary went to the Weaver residence, apologized for bringing Cassim to the police station, and told Weaver that he wanted to speak to the defendant about the victim's murder. Weaver knew the victim and was aware of the shooting. Weaver told the police that the defendant was away at camp and that he would be returning on Sunday, August 24. Weaver and O'Leary agreed that they would meet, with the defendant present, on Monday, August 25.

In the time between speaking with Weaver and the anticipated interview with the defendant, O'Leary learned that the Boston police had arrested the defendant on a drug offense on July 26, 2003. The booking sheet generated after that arrest indicated that the defendant was wearing a Detroit Tigers baseball cap. This baseball cap closely resembled the baseball cap found near the scene of the victim's shooting.

At approximately 8:30 p.m. on August 25, O'Leary returned to the Weaver home with another detective to meet with the defendant. Although Weaver was cordial and respectful, the presence of the detectives in her home caused her to feel very uncomfortable. Weaver had not had any previous contact with the police and she was still upset and concerned about the detectives conducting the interview with Cassim. She invited the detectives to sit at the dining room table, where she and the defendant joined them. At some point during the conversation, Weaver left the table to continue cooking dinner in the adjoining kitchen. The apartment had an open floor plan, and the view from the dining room table to the kitchen was unobstructed.

Before the detectives began questioning the defendant, O'Leary produced a waiver form that contained a printed version of the Miranda warnings especially for juveniles. Upon seeing the form, Weaver asked if it was necessary to give her son the Miranda warnings. O'Leary told her that it was "routine" and then explained that because his purpose was to question the defendant about the victim's shooting, the defendant should be advised of his Miranda rights before any questioning took place. O'Leary first asked the defendant to complete the part of the form containing his personal information. The defendant did so at his mother's direction. O'Leary read each of the rights from the form and then asked Weaver and the defendant if they understood them. He also asked them to initial the form after each warning to indicate that the rights had been explained to them. The pretrial motion judge concluded that Weaver, though not highly educated, is an intelligent woman and understood those rights.

Weaver noticed that the defendant was becoming "aggravated and frustrated" as the rights were being explained. She told him to relax and breathe while encouraging him to sign the form. She and the defendant verbally acknowledged that they understood the rights being explained and initialed the form as requested. Weaver never explained her understanding of these rights to the defendant.

After Weaver and the defendant signed the form, O'Leary told Weaver that she could speak with her son privately. They went to the area near the stairs, away from where they had been sitting. After a few minutes, they returned to the dining room. O'Leary stated that if they understood the rights and if they agreed to speak with the detectives, the defendant should sign the part of the form that acknowledged that he had taken advantage of the opportunity to speak with his mother outside the presence of the police officers. The defendant and his mother signed the form.

The detectives then questioned the defendant about the victim's shooting for about three hours. Weaver occasionally left the table to continue cooking dinner but remained within earshot of the interview at all times. The defendant denied that he was in the area of Wendover Street on the night of the shooting, that he was associated with any of the individuals named by the police, or that he knew about a fight involving the victim and other youths who had accused the victim of stealing a bicycle.

The detectives asked more difficult questions that left no doubt that they suspected the defendant of having been involved in the shooting. The defendant was unaware that the detectives had information that the defendant had fallen from his bicycle the night of the shooting. O'Leary asked the defendant how (not if)

the defendant had hurt his leg; the defendant said that he had injured it playing basketball. Signaling his disbelief, O'Leary asked the defendant if it was possible that he had injured himself by falling off his bicycle the night of the shooting. The defendant denied this, and said whoever said that was lying. When pressed about when the basketball injury occurred, the defendant was unable to specify the date. Weaver volunteered that they had gone to church on August 10 and that the defendant was not limping at that time. After consulting a calendar and reviewing the events of the weeks passed, the defendant said that his injury occurred two days after the shooting.

The detectives then questioned the defendant about his Detroit Tigers baseball cap. The defendant admitted to wearing such a cap when he was arrested on July 26. He also agreed that the cap was distinctive on account of the airbrushed letter "D" on either side of the logo. The defendant said that he had taken the cap to an establishment in downtown Boston to have the distinctive markings placed on it. When asked where the cap was, the defendant stated that it was lost or stolen the same day that he hurt his leg playing basketball. When pressed on the date, the defendant stood by his statement that it was lost on August 12.

O'Leary then told the defendant that a witness had observed a black male matching the defendant's description running from the scene of the shooting and losing a baseball cap that had been recovered by the police. He said that if the defendant was not wearing the cap, then it must have been Cassim. The defendant denied that Cassim was at the scene. O'Leary expressed his confidence that the defendant was present on Wendover Street on August 10 and was involved in the shooting. The interrogation was terminated shortly

thereafter. O'Leary told the defendant that he "needed to know the truth" and that the investigation would continue. O'Leary told Weaver that he did not believe the defendant's story.

Although he made no promises of leniency, O'Leary urged Weaver to "sit down and talk with [the defendant]," "have a heart to heart talk," and "try to figure out" his role in the events of the shooting. O'Leary did not suggest questions to Weaver, but he suspected that the defendant was involved and was hoping for whatever information Weaver could provide to assist in the investigation.

The pretrial motion judge found that neither Weaver nor the defendant asked the detectives to leave their home, nor did they ever request an attorney or seek in any way to terminate the interview. The defendant's demeanor during the questioning was sober and coherent, except for when he seemed to be agitated that the same questions were being asked repeatedly. The defendant did not appear to be under the influence of drugs or alcohol, incapacitated, or incompetent. Although the detective suspected that the defendant was involved in the shooting, he did not have an arrest warrant and Weaver was free to terminate the questioning at any time.

After the detectives left, Weaver began questioning her son. She was upset that the detectives had come to her home and was concerned with some of the defendant's answers to their questions. She was particularly concerned that the defendant's baseball cap may have been found at the scene of the shooting, and she wanted answers from him. The pretrial motion judge found that she was as much concerned with her own need to clarify her son's involvement in a very serious crime as she was with the detective's request that she

speak with the defendant. In her own words, she "wanted to have some peace with this thing." She asked the defendant the same questions that she had heard the detectives asking and did not believe the defendant's answers. After about an hour, she stopped questioning the defendant, and then sat in a chair for most of the night thinking about what had just happened.

O'Leary telephoned Weaver the next morning while she was at work to ask if she had had the "heart to heart" talk with the defendant. Weaver told him that she had not, but would when she got home from work. She did not tell O'Leary about her conversation with the defendant from the night before.

Because she was distracted by the events of the previous evening, Weaver decided to leave work early and arrived home around 10 a.m. She decided to talk with the defendant again because she "didn't have peace with this thing in my mind." After about an hour she stopped questioning him because the questions and answers gave her a headache. About one-half hour later, she called the defendant back to resume her questioning. She brought God into the conversation, and told the defendant that a boy had died and that such a thing could not be a secret between children, that God knew about it, and that the defendant would have no life at all if he did not tell what he knew about the killing. She continued to question him on and off until the late afternoon. In an effort to get the defendant to tell the truth, she resorted to pounding her fist on the kitchen table and gritting her teeth. The pretrial motion judge found that in seeking the truth about the defendant's involvement in the shooting, Weaver was motivated by a desire to do the right thing

in accordance with her personal spiritual beliefs and was not acting as an agent of the police.

Weaver then prayed again and told the defendant she would ask him two questions. She asked if he was in the area when the shooting occurred; the defendant said, "Yes." She then asked if he did it or if he knew who did it. The defendant put his head down but said nothing; Weaver took this gesture to mean "Yes." Weaver, who the pretrial motion judge found to be a woman of sincere and deeply held religious convictions, began to cry and to pray out loud. The defendant's sister came into the house and joined her mother in prayer. Having realized the defendant may have been involved in a murder, Weaver insisted that the defendant had to confess for the good of his soul.

The pretrial motion judge found that the concern and love that Weaver felt for her son expressed itself at this point in her singular focus on his spiritual rather than his legal well-being. She did not give the defendant any advice or counsel that would have made him aware of the need to avail himself of the constitutional protections to which he was entitled. She did not tell the defendant to remain silent but rather advised him to tell the truth to the police. She did not seek legal assistance for her son.

At approximately 4 p.m., Weaver tried to contact O'Leary. He called her back at around 8 p.m. and she told him that she was bringing the defendant to speak with him. O'Leary replied that he assumed the defendant was involved, and Weaver said, "Yes."

In the midst of the talk about God and surrender as the way to salvation, the defendant told his mother that he did not want to go to the police station. In the end, however, he succumbed to his mother's entreaties

that he confess for the good of his soul and turn himself in to the police. Weaver formulated a plan that they would go to the police station, that he would say, "I shot Germaine Rucker," and the detectives would then take him into custody. He was to say nothing more until a lawyer was appointed to represent him. Sometime after midnight on August 27, the Weaver family concluded their prayer session and left their home to go to the police station, which was a short distance away. On the way, they prayed out loud. When they arrived at the station, at approximately 12:30 a.m., they stood together in a circle, praying for the defendant. The defendant was crying. They waited for O'Leary and the other detective to arrive. No police officer had requested that the defendant be brought to the police station.

When the detectives arrived, Weaver told O'Leary that the defendant had something to say to them, that she expected them to take him into custody after his statement, and that she wanted him to have an attorney before they questioned him any further. Realizing that the defendant was about to make an inculpatory statement, O'Leary indicated that he would not take any statement until the defendant was represented by counsel. However, he did not tell the defendant to remain silent until they could arrange for an attorney. At the same time, O'Leary produced a juvenile Miranda form from his briefcase and began reciting the warnings to the defendant. As he did so and before he could finish reading the rights, the defendant said, "I shot Germaine Rucker." O'Leary then arrested the defendant and read him his rights. Until the defendant made the statements, he was free to leave the station.

i. *August 25 statements.* The defendant first argues that the statements made in his home on August 25, 2003, should have been suppressed because he did not validly waive his Miranda rights before speaking with the police and because his statements were not voluntary. Rejecting these contentions, the pretrial motion judge concluded that the Miranda warnings were not required and that the defendant's statements were voluntarily made. We agree.

A. *Custodial interrogation.* Miranda warnings are required only when a defendant is subjected to a custodial interrogation, and "a defendant's failure to receive or understand Miranda warnings, or police failure to honor Miranda rights, does not result in suppression of a voluntary statement made in a noncustodial setting" (citation omitted). *Commonwealth v. Libby, 472 Mass. 37, 40, 32 N.E.3d 890 (2015).* Whether an interrogation is custodial depends on the "objective circumstances of the interrogation, and not on the subjective views of either the interrogating officers or the person being questioned." *Commonwealth v. Sneed, 440 Mass. 216, 220, 796 N.E.2d 1284 (2003).* This inquiry focuses on whether a reasonable person in the defendant's position would believe that his freedom of movement was restricted to the degree associated with formal arrest. *Commonwealth v. Morse, 427 Mass. 117, 123, 691 N.E.2d 566 (1998).* In determining whether a defendant was in custody, the court considers "(1) the place of the interrogation; (2) whether the police conveyed any belief or opinion that the person being questioned was a suspect; (3) whether the questioning is aggressive or informal; and (4) whether the suspect was free to end the interview by leaving the place of interrogation, or whether the interview ended with the defendant's

arrest." *Commonwealth v. Murphy, 442 Mass. 485, 493, 813 N.E.2d 820 (2004).*

We agree with the pretrial motion judge's findings that the environment in which the defendant was questioned was not inherently coercive because it occurred in the defendant's home, on a date and time of his convenience, and in his mother's presence. See *Commonwealth v. Conkey, 430 Mass. 139, 144, 714 N.E.2d 343 (1999), S.C., 443 Mass. 60, 819 N.E.2d 176 (2004)* (interrogation not custodial where defendant allowed police into home to question him). Although the detectives informed the defendant that they believed he was involved in the crime being investigated, they did not coerce or threaten the defendant during the interview, and the defendant and his mother were free to terminate the interview at any time.

We appreciate that Weaver, and not the defendant, invited the detectives into their home and permitted them to conduct the interview. Nonetheless, we agree with the pretrial motion judge that a reasonable person in the defendant's position would not have viewed his questioning as coercive or believed that his freedom of movement was curtailed to the degree of arrest. Accordingly, the Miranda warnings were not required in connection with the August 25 interrogation.

B. *Interested adult.* We also agree with the pretrial motion judge's conclusion that, even if Miranda warnings were required, there is no merit to the defendant's argument that his waiver was invalid because he was not afforded the special protections due to juveniles. "Investigating officials permissibly may interview a juvenile suspected of a crime, and a statement that is the product of that interview, if

knowing and voluntary, may be admitted at trial against the juvenile." *Commonwealth v. Philip S., 414 Mass. 804, 808, 611 N.E.2d 226 (1993).* However, the Commonwealth bears a heavy burden of demonstrating that a defendant knowingly and intelligently waived his or her privilege against self-incrimination. *Commonwealth v. Berry, 410 Mass. 31, 34, 570 N.E.2d 1004 (1991), S.C., 420 Mass. 95, 648 N.E.2d 732 (1995)* Where a defendant is a juvenile, the court proceeds with "special caution when reviewing purported waivers of constitutional rights" (quotation omitted). *Id.* Where a juvenile is at least fourteen years of age, the Commonwealth must demonstrate that prior to waiving his rights, he was given the opportunity to consult with an interested adult who was informed of, and understood, those rights. *Id. at 35.*

In his motion to suppress, the defendant argued that his mother was not an "interested adult" because she did not understand the Miranda warnings and because she felt compelled to sign the waiver and to have the defendant sign the waiver. The defendant also denied having the opportunity to consult with her.

In determining whether an adult is an interested adult, "the facts must be viewed from the perspective of the officials conducting the interview." *Philip S., 414 Mass. at 809.* The court examines whether, at the time of the investigation, "it should have been reasonably apparent to the officials questioning a juvenile that the adult who was present on his or her behalf lacked capacity to appreciate the juvenile's situation and to give advice, or was actually antagonistic toward the juvenile." *Id.* If such facts are present, the court is warranted in finding that the juvenile was not assisted by an interested adult and was not afforded the opportunity for consultation. *Id.*

Here, the pretrial motion judge explicitly found that Weaver understood the Miranda warnings, and we see no grounds to disturb this finding. To the extent that the testimony of Weaver and that of the detectives differed on this point, we note that credibility determinations "are the province of the motion judge." *Commonwealth v. Johnson, 461 Mass. 44, 48, 958 N.E.2d 25 (2011).* Moreover, viewing the circumstances from the perspective of the officers, it appeared that Weaver was an intelligent, responsible adult who cared for her son and was concerned for his welfare. Additionally, the record reflects that Weaver understood why the police were questioning her son, and she remained present or within listening distance throughout the interview. Nor was there any apparent animosity between the defendant and Weaver.

The judge also found that Weaver and the defendant had had a private consultation prior to signing the form and waiving their rights. Even if Weaver and the defendant did not speak during this time, we note that "[i]t is not necessary for such a juvenile actually to consult with the interested adult, for it is the *opportunity* to consult that is critical." *Berry, 410 Mass. at 35.*

Additionally, the motion judge correctly found that Weaver was an interested adult despite encouraging the defendant to speak with the detectives and to tell the truth. "We reject the notion that a parent who fails to tell a child not to speak to interviewing officials, who advises the child to tell the truth, or who fails to seek legal assistance immediately is a disinterested parent." *Philip S., 414 Mass. at 810.* See *Commonwealth v. Quint Q., 84 Mass. App. Ct. 507, 517, 998 N.E.2d 363 (2013)* (mother who advised son to be truthful with police was interested adult despite giving advice that

would not have comported with that of lawyer). In other words, an interested adult is not a proxy for a lawyer. Accordingly, we conclude that the defendant was afforded the protections of the interested adult rule.

C. *Valid waiver.* Even assuming the Miranda warnings were required, we conclude the defendant's waiver of his Miranda rights was valid. In determining whether a waiver is knowing and voluntary, the court examines the totality of the circumstances surrounding the waiver. See *Commonwealth v. Mazariego, 474 Mass. 42, 52-53, 47 N.E.3d 420 (2016).* Factors relevant to this inquiry include "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency . . . and the details of the interrogation, including the recitation of Miranda warnings" (citation omitted). *Commonwealth v. Walker, 466 Mass. 268, 274, 994 N.E.2d 764 (2013).*

The facts support the pretrial motion judge's conclusion that the defendant's waiver was knowing and voluntary. The defendant and his mother were provided with Miranda warnings, which both understood. The interrogation took place in the defendant's home and in the presence of his mother. The record did not show that the defendant's will was overborne by his mother's directions to sign the form. Although the interview lasted some time, the questioning was generally nonaggressive and the police did not make any threats or promises to the defendant. The defendant was young, but was of average intelligence and had had at least one prior experience with the police. His responses to questions were coherent, and

there was no evidence that he was under the influence of alcohol or other substances. Nor did the defendant present any evidence that his mental state was otherwise compromised. The defendant also made several statements aimed at exculpating himself, including stating that he was not at the scene of the shooting and providing an explanation for the injury to his leg. See *Commonwealth v. Vazquez, 387 Mass. 96, 100, 438 N.E.2d 856 (1982)* (exculpatory statements tend to show defendant's statements are voluntary).

D. *Voluntariness.* Due process requires a separate inquiry into the voluntariness of a defendant's inculpatory statements. *Commonwealth v. Siny Van Tran, 460 Mass. 535, 559, 953 N.E.2d 139 (2011).* "A voluntary statement is one that is the product of a rational intellect and a free will, and not induced by physical or psychological coercion" (citation and quotations omitted). *Commonwealth v. Monroe, 472 Mass. 461, 468, 35 N.E.3d 677 (2015).* The court examines the totality of the circumstances to determine whether the defendant's statements were the product of free will and rational intellect and "not the product of inquisitorial activity which had overborne his will" (citation omitted). *Siny Van Tran, supra.* Relevant factors include "the defendant's age, education, intelligence, physical and mental stability, and experience with the criminal justice system." *Id.* Applying these factors to the circumstances, we conclude that the defendant's waiver was knowing and voluntary for largely the same reasons set forth above. Additionally, although the defendant expressed frustration with the questioning, the record does not show that he was agitated or emotionally overwrought. Cf. *Monroe, 472 Mass. at 470-471* (statements coerced where defendant demonstrated disturbed emotional state, was threatened by police and was crying, and was subjected to hostile

interview). Given these circumstances, the pretrial motion judge did not err in concluding that the defendant's statements on August 25, 2003, were voluntary, and not the product of physical or psychological coercion.

ii. *August 27 statement.* The defendant also argues that the motion judge erred in denying his motion to suppress his statement at the police station, "I shot Germaine Rucker," because it was obtained in violation of his Miranda rights and was involuntary. As the pretrial motion judge correctly concluded, the Miranda warnings were not required because the defendant's statement was not the product of interrogation or its functional equivalent by the police. See *Commonwealth v. Gonzalez, 465 Mass. 672, 675, 991 N.E.2d 1036 (2013)* ("term 'functional equivalent' includes 'any words or actions on the part of the police [other than those normally attendant to arrest and custody] that the police should know are reasonably likely to elicit an incriminating response from the suspect'" [citation omitted]). Here, the detective was reciting the Miranda warnings when the defendant made his statement. Although the detectives anticipated that the defendant would make a statement and were therefore providing the Miranda warnings, the statement was not made because of words or actions by the detectives meant to elicit it.

A. *Agent of the police.* The defendant also argues that his statement should have been suppressed because his mother acted as an agent of the police when she brought him to the police station to make the statement. A private party is considered a State agent when government officials prompt the party to act or participate with the party in an action which they themselves could not have legally engaged. *Common-*

wealth v. Jung, 420 Mass. 675, 686, 651 N.E.2d 1211 (1995). An individual is not a State agent if no promises are made in exchange for the individual's help and if nothing was offered or asked of that individual. *Commonwealth v. Reynolds, 429 Mass. 388, 393, 708 N.E.2d 658 (1999)*, quoting *Commonwealth v. Harmon, 410 Mass. 425, 428, 573 N.E.2d 490 (1991)*. Here, the detectives urged Weaver to have a heart to heart conversation with her son to determine whether he participated in the shooting, and although he followed up on this request with a telephone call to Weaver, he did not otherwise make any threats or promises to obtain her assistance. Additionally, the detectives do not appear to have been trying to gain information through Weaver that they could not otherwise legally obtain themselves, especially where the defendant voluntarily submitted to questioning about the shooting. Moreover, the pretrial motion judge's finding that Weaver aggressively questioned the defendant out of her desire to do what was right in accordance with her personal spiritual beliefs undercuts the defendant's argument. See *Commonwealth v. Foxworth, 473 Mass. 149, 158, 40 N.E.3d 1003 (2015)*; *Reynolds, 429 Mass. at 393* (individual who has not entered into agreement with government or who reports incriminating evidence to police out of conscience not acting as government agent [quotation and citation omitted]). We therefore reject the defendant's contention that Weaver was acting as an agent of the police in encouraging the defendant's confession.

B. *Voluntariness*. We lastly consider the defendant's argument that his statement at the police station was involuntary and the product of coercion by his mother. "[U]nder the law of this Commonwealth, a judge must determine the voluntariness of statements

extracted by private coercion, unalloyed with any official government involvement" (quotation and citation omitted). *Commonwealth v. Paszko, 391 Mass. 164, 176-177, 461 N.E.2d 222 (1984).* "[A] statement obtained through coercion and introduced at trial is every bit as offensive to civilized standards of adjudication when the coercion flows from private hands as when official depredations elicit a confession" (citation omitted). *Commonwealth v. Allen, 395 Mass. 448, 455, 480 N.E.2d 630 (1985).* Accordingly, our inquiry is governed by the same analysis delineated above regarding the voluntariness of the defendant's August 25 statements.

The defendant argues that his mother coerced his August 27 confession by relentlessly questioning him for two days about his involvement in the shooting, by demanding that he tell the truth, and by making him feel guilty by praying and invoking God and the need to "be at peace," and by forcing him to travel to the police station to confess. It is well-settled that a defendant may offer evidence that a relative's involvement in questioning about a crime is coercive. See *Commonwealth v. McCra, 427 Mass. 564, 569, 694 N.E.2d 849 (1998); Commonwealth v. Adams, 416 Mass. 55, 60-61, 617 N.E.2d 594 (1993).* The pretrial motion judge concluded that although Weaver's exhortations played a major role in the defendant's decision to confess, the circumstances of the confession did not evidence that the defendant's will was overborne to the extent that he lost his ability to make an independent decision. Cf. *Commonwealth v. Burgess, 434 Mass. 307, 314, 749 N.E.2d 112 (2001)* (police may "broadly" suggest that it would be best for suspect to tell truth); *Commonwealth v. Cunningham, 405 Mass. 646, 658, 543 N.E.2d 12 (1989)* (defendant's statement, prompted by urging of police and priest that it would

be best to tell truth, not psychologically coerced where defendant made voluntary decision to make statement, in part to unburden troubled conscience); *Philip S., 414 Mass. at 813* (court declined to consider requests that juvenile tell truth as coercive practice).

We agree with the pretrial motion judge's findings that the defendant was not physically or psychologically coerced by his mother and her religious beliefs such that he could not resist her pleas that he tell the truth. The defendant and his family prayed at the police station, and the defendant cried, but he was not otherwise overwrought such that his statement was not the product of free will and a rational intellect. Moreover, the defendant does not argue that his mother's efforts to get him to confess were an improper appeal to his religious beliefs. In fact, the record does not demonstrate whether the defendant held the same beliefs as his mother. Cf. *United States v. Miller, 984 F.2d 1028, 1032 (9th Cir.)*, cert. denied, *510 U.S. 894, 114 S. Ct. 258, 126 L. Ed. 2d 210)*; *Mersereau v. State, 2012 WY 125, 286 P.3d 97, 115 (Wyo. 2012)* (court considered whether appeal to suspect's religious beliefs was unduly coercive). Nor did his mother, in invoking God, indicate that the defendant would be treated more leniently if he confessed. We thus conclude that Weaver's questioning of the defendant did not rise to the level of improper psychological coercion that would render his statement involuntary, and the defendant's confession on August 27 was a free and voluntary act.

Accordingly, we conclude that the judge did not err in denying the defendant's pretrial motion to suppress on the various grounds asserted by the defendant.

c. *Ineffective assistance of counsel.* i. *Mental health expert.* The defendant argues that the judge who heard one portion of his motion for a new trial (first new trial

motion judge)[3] erroneously denied that portion of the motion, which was based on the failure of the defendant's trial counsel to investigate the defense of psychological coercion adequately by not consulting with a mental health expert or presenting expert testimony about the voluntariness of the defendant's confession at either the suppres- sion hearing or at trial.[4] The defendant also contends that the first new trial motion judge erred because he failed to distinguish between testimony concerning the voluntariness of a statement and the phenomenon of false confessions. We conclude that the motion was properly denied, although for reasons different than those stated by the judge.

In a written memorandum of decision and order issued after three days of evidentiary hearings, the first new trial motion judge made the following findings of fact.[5] The defendant's trial counsel is a very

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[3] In his motion for a new trial, the defendant asserted two bases for ineffective assistance of counsel. Because the trial judge had retired, the issues were bifurcated and decided by judges other than the trial judge.

[4] The defendant initially argued that trial counsel should have consulted with an expert and presented expert testimony on the existence and etiology of false confessions, in addition to expert testimony on the issue of voluntariness. On appeal, the defendant abandons this argument and acknowledges we have not yet ruled such evidence admissible. *Commonwealth v. Hoose, 467 Mass. 395, 419, 5 N.E.3d 843 (2014).*

[5] Because the judge who heard this portion of the defendant's motion for a new trial (first new trial motion judge) drew facts about the murder, investigation, and defendant's admission from those found by the judge had who presided over the defendant's pretrial motion to suppress, we do not repeat them here. Insofar as relevant here, the first new trial motion judge based his additional findings on the affidavits and testimony of the

experienced and highly regarded defense attorney. He has practiced law for over forty years and handled over one hundred murder trials at the trial and appellate level. Because the defendant was sixteen years of age, trial counsel spent a great deal of time speaking with the defendant's mother about the circumstances surrounding the defendant's statements to her, and formulated the defense that the police used Weaver as their agent to induce the defendant to admit his involvement in the homicide. Trial counsel moved to suppress the defendant's August 27, 2003, statement to the police on that ground, as well as on the ground that Weaver failed to act as an interested adult for her son by impermissibly pressuring him to confess to the police.

Trial counsel testified that he prepared a defense by learning the facts of a case and then, starting from scratch, researching the law as it related to the issues presented. The judge found that at the time trial counsel litigated the motion to suppress and tried the case, he had researched but was not aware of any appellate or trial court decisions permitting expert testimony on claimed coerced or false confessions.[6]

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defendant's trial counsel and Dr. Frank DiCataldo, a psychologist whom the defendant had retained, as well as the affidavits of the defendant and his mother, Weaver. The affidavits submitted by the defendant and Weaver reiterated that the defendant's statements were not the product of his free will, but rather were coerced by Weaver.

[6] The first new trial motion judge noted that trial counsel had defended one case where a codefendant's request to present expert testimony on coerced and false confessions was denied because it failed to satisfy the standards of expert testimony, and that the ruling was affirmed on appeal. See *Commonwealth v. Robinson, 449 Mass. 1, 5-7, 864 N.E.2d 1186 (2007)*. Trial counsel acknowledged he would have been aware of the decision.

According to trial counsel, there was no strategic reason not to consult with or present an expert on psychological coercion and, given the nature of the defense, it would not have harmed the defense to do so.

In connection with the motion for a new trial, Dr. Frank DiCataldo, a forensic psychologist, examined the defendant and testified at the evidentiary hearing. DiCataldo did not find any evidence that the defendant suffered from any significant cognitive limitations and did not detect any signs of mental illness. After administering two psychological tests, interviewing the defendant, and gaining an understanding of the defendant's family dynamics, DiCataldo opined that by virtue of a protracted investigation by his mother, the defendant's admissions were not the product of his own free will or rational intellect. DiCataldo acknowledged that the basis for his opinion was limited because he had never evaluated a voluntariness claim where the asserted coercive force was a parent, or where the statement was made ten years prior to the evaluation. DiCataldo also acknowledged that neither of the tests he administered to the defendant was specifically focused on juveniles and that there are no specific psychological tests to determine whether a person's will has been overborne.

Applying the standard set forth in *Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974)*, the first new trial motion judge denied the defendant's motion. In doing so, he rejected the defendant's claim that trial counsel was ineffective for failing to consult with an expert witness. The judge found that it was more likely than not that trial counsel was aware of the absence of Massachusetts case law permitting expert testimony on the psychology of coerced and false

confessions, and did not consult an expert because it would not have added value to the defense.

The judge further concluded that the defendant failed to satisfy the prejudice prong of a *Saferian* analysis because he could not demonstrate, as a threshold matter, that DiCataldo's testimony would have been admissible under the foundational requirements of *Mass. G. Evid. § 702(b) (2016)*. Additionally, the judge found that the parent-child dynamic is so generally familiar to a fact finder that expert testimony was not required to further illuminate the issue for a jury. Moreover, the psychological influences of a parent on her child are categorically different from those of other authority figures, such as the police. Thus, the judge found, DiCataldo's reliance on scientific research involving the impact of psychologically coercive or manipulative techniques by police to obtain a statement do not provide a basis for his opinion that, in this case, the defendant was coerced by his mother's conduct. The judge concluded that because DiCataldo's proffered testimony was inadmissible under *§ 702(b)*, trial counsel's failure, either to consult an expert or attempt to present expert testimony, could not have prejudiced the defendant's case.

Where a defendant has been convicted of murder in the first degree, the court evaluates a claim of infective assistance claim to determine whether "there exists a substantial likelihood of a miscarriage of justice," *Commonwealth v. Williams, 453 Mass. 203, 204, 900 N.E.2d 871 (2009)*. The court asks "[1] whether there was an error in the course of trial (by defense counsel, the prosecutor, or the judge), and, [2] if there was, whether that error was likely to have influenced the jury's conclusion" (citation omitted). *Commonwealth v. Lang, 473 Mass. 1, 19, 38 N.E.3d 262 (2015)* (Lenk, J.,

concurring). This standard is more favorable than the constitutional standard for determining ineffectiveness of counsel. *Commonwealth v. Gonzalez, 443 Mass. 799, 808, 824 N.E.2d 843 (2005).* The court considers the defendant's claim "even if the action by trial counsel does not constitute conduct 'falling measurably below that . . . of an ordinary fallible lawyer'" (citation omitted). *Id. at 808-809.*

Where a defendant challenges tactical or strategic decisions by trial counsel, the court will find ineffective assistance "only if such a decision was manifestly unreasonable when made." *Commonwealth v. Diaz, 448 Mass. 286, 288, 860 N.E.2d 665 (2007).* However, the "manifestly unreasonable standard" only applies "where the attorney's purportedly constitutionally ineffective conduct involved a strategic decision, rather than some other claimed inadequacy such as a lack of appropriate investigation or preparation by defense counsel." *Lang, 473 Mass. at 20* (Lenk, J., concurring), citing *Commonwealth v. Martin, 427 Mass. 816, 822, 696 N.E.2d 904 (1998).*

In *Lang*, trial counsel was aware of the defendant's psychiatric history but chose to pursue another defense without investigating a criminal responsibility defense. *Lang, 473 Mass. at 11-12* (Hines, J., concurring). A majority of justices concurred that the "manifestly unreasonable standard" did not apply in these circumstances because "strategic choices made after less than complete investigation are reasonable [only] to the extent that reasonable professional judgments support the limitation on investigation." *Id. at 19* (Lenk, J., concurring), quoting *Commonwealth v. Baker, 440 Mass. 519, 529, 800 N.E.2d 267 (2003).* Although *Lang* and the cases cited therein relate to the adequacy of an investigation into a lack of criminal

responsibility defense, these cases provide a useful framework for evaluating the defendant's claim.

Here, the first new trial motion judge found that there was no evidence showing that trial counsel's failure to consult with a mental health expert was a lapse rather than a reasoned decision. This finding was confined to trial counsel's investigation into case law permitting expert testimony on psychological coercion as it related to false confessions and did not address trial counsel's strategy with respect to expert testimony about voluntariness. We therefore assume without deciding that trial counsel's failure to consult with a mental health expert was not a strategic or tactical decision and thus manifestly unreasonable. Accordingly, we ask only whether the failure to consult a mental health expert or to present expert testimony at trial as to the voluntariness of the defendant's statements "was likely to have influenced the jury's conclusion." *Commonwealth v. Wright, 411 Mass. 678, 682, 584 N.E.2d 621 (1992), S.C., 469 Mass. 447, 14 N.E.3d 294 (2014).*

In order to carry his burden of demonstrating that the expert consultation and testimony would have accomplished something material for the defense, *Commonwealth v. Bell, 460 Mass. 294, 303, 951 N.E.2d 35 (2011),* the defendant, as a threshold matter, must demonstrate that DiCataldo's testimony would have been admissible. The first new trial motion judge correctly concluded that DiCataldo's testimony regarding a child's susceptibility to parental coercion generally or the defendant's susceptibility to coercion by his mother would not have been admissible.

Section 702 of the Massachusetts Guide to Evidence, regarding the admission of expert testimony, provides:

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if
>
> "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> "(b) the testimony is based on sufficient facts or data;
>
> "(c) the testimony is the product of reliable principles and methods; and
>
> "(d) the expert has reliably applied the principles and methods to the facts of the case."

Mass. G. Evid. § 702 (2016).

DiCataldo's evaluation of the defendant was based on his assessment of the defendant through the administration of psychological tests and information provided by the defendant and his mother. The first new trial motion judge noted that the facts relied on by DiCataldo were substantially different from those presented at the hearing on the motion to suppress and found by the pretrial motion judge. Additionally, DiCataldo created his own methodology for forming an opinion about the voluntariness of the defendant's statement because he was not aware of any peer-reviewed or generally accepted methodology within the psychological community that would apply to the circumstances in this case.

We have explained that "expert testimony is sufficiently reliable if the underlying theory or methodology is either (1) generally accepted in the relevant scientific community; . . . or (2) satisfies the alternative

requirements adopted in [*Commonwealth v. Lanigan, 419 Mass. 15, 24-26, 641 N.E.2d 1342 (1994)*]" (citation omitted). *Commonwealth v. Shanley, 455 Mass. 752, 761-762, 919 N.E.2d 1254, (2010).* The defendant claims that he demonstrated the admissibility of DiCataldo's testimony by establishing general acceptance in the psychological community. We disagree.

First, the defendant relies on the false logic that because DiCataldo has rendered his expert opinion in other cases in the Commonwealth, his opinion was admissible in this case. We reject this unsubstantiated statement. The defendant does not point to a single case where DiCataldo testified about the coercion of a child by a parent.

The defendant further argues that the first new trial motion judge erred in ruling that DiCataldo's testimony was inadmissible because the courts of the Commonwealth have long recognized that a defendant is entitled to present expert testimony by a mental health expert regarding the voluntariness of a statement, that trial counsel should have sought expert testimony in light of this precedent, and that such testimony is admissible. The defendant cites to several cases to illustrate this point. Notably, in each of these cases, the proffered expert testimony related to a mental impairment that called into question the voluntariness of the defendant's statements. See, e.g., *Commonwealth v. Boyarsky, 452 Mass. 700, 713, 897 N.E.2d 574 (2008)* (panic disorder); *Commonwealth v. Crawford, 429 Mass. 60, 67, 706 N.E.2d 289 (1999),* overruled on another ground by *Commonwealth v. Carlino, 449 Mass. 71, 865 N.E.2d 767 (2007)* (battered woman's syndrome and posttraumatic stress disorder); *Commonwealth v. Monico, 396 Mass. 793, 798-799, 488 N.E.2d 1168 (1986)* (head trauma that impacted

voluntariness of statements and raised question of criminal responsibility); *Commonwealth v. Daniels, 366 Mass. 601, 608, 321 N.E.2d 822 (1975)* (intellectual disability); *Commonwealth v. Harrison, 342 Mass. 279, 289, 293, 173 N.E.2d 87 (1961)* (head trauma, mental illness, personality disorder, "defective intelligence," psychosis); *Commonwealth v. Banuchi, 335 Mass. 649, 655-656, 141 N.E.2d 835 (1957)* (effect of sudden deprivation of alcohol on mental capacity of confirmed alcoholic).

The defendant argues that in rejecting DiCataldo's testimony as inadmissible, the first new trial motion judge effectively concluded that psychology as a science was incapable of yielding reliable admissible evidence probative of a statement's voluntariness. The defendant's characterization of the judge's ruling is unfounded. Rather, our case law demonstrates that when expert testimony as to a novel or developing area of science is offered, the court carefully considers whether it is "sufficiently reliable to reach the trier of fact." *Shanley, 455 Mass. at 761.* See, e.g., *Commonwealth v. Hoose, 467 Mass. 395, 419, 5 N.E.3d 843 (2014); Crawford, 429 Mass. at 67.*

In addition to determining the reliability of an expert's proffered testimony, "[t]he judge must also determine whether the reasoning or methodology can be applied to the facts in issue—that is, whether there is a proper 'fit' between the two." *Shanley, 455 Mass. at 761 n.13.* Here, DiCataldo, in addition to employing a one of a kind methodology to evaluate the defendant, relied on research involving the impact of psychologically coercive or manipulative techniques by police to obtain a statement to evaluate whether the defendant had been coerced by his mother. Not only is this reasoning a poor "fit," but it also depends on expert

testimony on false confessions, which we have not yet ruled admissible. *Hoose, 467 Mass. at 419.*

Similarly misplaced is the defendant's reliance on our decisions in *Commonwealth v. Jackson, 471 Mass. 262, 264 n.5, 28 N.E.3d 437 (2015)*, cert. denied, *136 S. Ct. 1158, 194 L. Ed. 2d 187 (2016)*, and *Adams, 416 Mass. at 61*, where expert testimony was admitted to aid the jury in assessing the voluntariness of a juvenile's statements. In *Jackson, supra at 264 n.5*, the voluntariness of the defendant's statements to the police was an important issue at trial. The defendant called a clinical psychologist to testify "about his examination of the defendant and his opinion with regard to the defendant's susceptibility to being influenced by persons in authority like the police." *Id.*

While these facts are superficially similar to the defendant's case, there are important distinctions to be drawn. Although the admissibility of the expert testimony was not at issue in our decision in *Jackson*, our review of the record before the court in that case reveals that the defendant was evaluated by the clinical psychologist because there was a question of criminal responsibility and competency to stand trial. The psychologist conducted a forensic mental health assessment of the defendant, which included extensive investigation into the defendant's past as well as interviews and a number of psychological assessment tests of the defendant. He testified that the defendant suffered from attention deficit disorder and dependent personality disorder, and that these conditions made him more susceptible to being influenced by people in positions of authority. The methodology used by the psychologist and its application to the facts in *Jackson* were profoundly different from those used by Di-Cataldo. Moreover, the defendant in *Jackson, 471*

Mass. at 264 n.5, presented evidence that it was his mental health impairments that made him more susceptible to pressure by authority figures. Here, the defendant sought to present evidence that his will was simply overborne by his mother. These inquiries are fundamentally distinct.

Similarly, in *Adams, 416 Mass. at 60-61*, we held that it was error to exclude testimony from the defendant's mother and a forensic psychiatrist tending to show that the defendant had been coerced into confessing by the presence of his mother. Although we do not know the methodology employed by the psychiatrist in evaluating Adams, it is apparent from the unpublished memorandum and order that the Appeals Court issued pursuant to its *rule 1:28* following Adams's retrial that there was a contention that his intellectual abilities or disabilities may have affected the voluntariness of his statement. As discussed earlier, while we regularly admit expert testimony regarding the voluntariness of a statement where the defendant suffers from a mental impairment or mental health issue, there is no evidence that the defendant here had cognitive limitations or suffers from a mental illness that would affect his capacity to make a voluntary statement.

Finally, we agree with the first new trial motion judge's determination that the parent-child dynamic is generally familiar to a fact finder, and that the likelihood of a child being influenced by a parent is not a matter outside the common understanding of the average juror, nor is the proposition that a parent may exert pressure on his or her child a novel one. Thus, the jury's evaluation of whether the defendant's statements were psychologically coerced by his mother "could be accomplished through its common under-

standing without need of expert testimony." *Commonwealth v. Bly, 448 Mass. 473, 496, 862 N.E.2d 341 (2007).*

Our conclusion that DiCataldo's testimony would not have been admissible at trial does not foreclose a defendant from presenting expert testimony regarding coercion and voluntariness. "Determining whether . . . scientific testimony is reliable often will hinge on the presentations made by the parties in a particular case . . . and these determinations may vary appropriately on a case-by-case basis." *Canavan's Case, 432 Mass. 304, 312, 733 N.E.2d 1042 (2000).* In this case, the defendant failed to show that the methodology used by DiCataldo would be generally accepted by the scientific community or was otherwise admissible under the factors articulated in *Lanigan*. Because the testimony would not have been admissible at the defendant's trial, we cannot conclude that it would have accomplished something material for the defense such that the jury verdict would have been different. Accordingly, the defendant's claim of ineffective assistance must fail.

ii. *Public trial.* The defendant next claims error in the denial of the portion of his motion for a new trial that rested on the ground that his trial counsel was ineffective for failing to object to the closure of the court room during the entirety of jury empanelment.

After an evidentiary hearing, the judge who heard this portion of the motion (second new trial motion judge) issued a written memorandum of decision in which she found the following facts, which are supported by the evidence. Jury selection spanned two days. The approximately ninety venire members made the court room very crowded. They took every available seat, and those who could not find seats stood wherever

they could. On the first day of empanelment, a court officer informed the defendant's mother and those accompanying her that the court room was "closed for jury selection." They were also denied entry the second day of empanelment for the same reason. Trial counsel lodged no objection.

The second new trial motion judge concluded that the sole reason that a court officer closed the court room to the defendant's family and other members of the public was the crowded condition. The judge found that facts surrounding the empanelment did not satisfy the criteria articulated in *Waller v. Georgia, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)*, that may justify a court room closure, but concluded that the closure did not prejudice the defendant's case, and accordingly denied the motion.

A violation of the *Sixth Amendment* right to a public trial constitutes structural error. See *Commonwealth v. Jackson, 471 Mass. 262, 268, 28 N.E.3d 437 (2015)*, citing *United States v. Marcus, 560 U.S. 258, 263, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010)*. We agree with the second new motion judge's conclusion that the closure was a full, rather than partial, closure of the court room. See *Commonwealth v. Cohen (No. 1), 456 Mass. 94, 111, 921 N.E.2d 906 (2010)*; *Commonwealth v. Lavoie, 80 Mass. App. Ct. 546, 551-552, 954 N.E.2d 547 (2001), S.C., 464 Mass. 83, 981 N.E.2d 192*, cert denied, *133 S. Ct. 2356, 185 L. Ed. 2d 1080 (2013)*.

Where a meritorious claim of structural error is timely raised, the court presumes "prejudice, and reversal is automatic." *Jackson, 471 Mass. at 268*, quoting *Commonwealth v. LaChance, 469 Mass. 854, 856, 17 N.E.3d 1101 (2014)*, cert. denied, *136 S. Ct. 317, 193 L. Ed. 2d 227 (2015)*. However, the right to a public trial can be waived in some circumstances.

Jackson, supra. "[W]here the defendant has procedurally waived his *Sixth Amendment* public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply." *LaChance, supra at 856.*

The defendant did not raise an objection to the court room closure because his attorney did not understand that the public had a right to be present during the jury empanelment phase of the trial proceedings. The second new trial motion judge's analysis, which anticipated the rule announced in *LaChance, supra*, correctly determined that counsel's inaction was the product of "serious incompetency, inefficiency, or inattention to the defendant's *Sixth Amendment* right to a public trial, and was not objectively reasonable," but that the defendant otherwise failed to show that trial counsel's conduct caused prejudice warranting a new trial.

On appeal, the defendant does not dispute that he failed to demonstrate prejudice, but rather asks us to revise the *LaChance* rule and instead hold that that a defendant who raises an ineffective assistance of counsel claim and has established that, in failing to object to a court room closure, counsel's performance fell below that of an ordinary fallible attorney is entitled to a presumption of prejudice. See *LaChance, supra at 860-868* (Duffly, J., dissenting). We decline to do so.

Moreover, the defendant has not advanced any argument or demonstrated any facts that would sup-

port a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice. Relief is therefore not warranted under *G. L. c. 278, § 33E*, and the denial of the motion for a new trial is affirmed.

d. *Firearms conviction.* The defendant lastly asks the court to vacate his firearms conviction on the grounds that the Commonwealth presented no evidence that he lacked the required firearms licenses, and thus failed to prove beyond a reasonable doubt that he did not have a license to carry. Contrary to the defendant's assertion, lack of license is not an element of unlicensed possession, but rather an affirmative defense. *Commonwealth v. Allen, 474 Mass. 162, 174, 48 N.E.3d 427 (2016)*, and cases cited. Accordingly, the defendant bore the burden of producing evidence that he held a license, and he failed to carry that burden.

e. *Review under G. L. c. 278, § 33E.* We have reviewed the record in accordance with *G. L. c. 278, § 33E*, and we discern no basis on which to reduce the verdict of murder in the first degree or to order a new trial. The defendant's convictions are affirmed. Based on the record before us, it appears that the defendant is entitled to the benefit of a corrected mittimus to reflect that his life sentence under *G. L. c. 265, § 2*, carries with it the opportunity for parole consideration after fifteen years because he was a juvenile at the time of his conviction. See *Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 673, 1 N.E.3d 270 (2013), S.C., 471 Mass. 12, 27 N.E.3d 349 (2015)*, and *Commonwealth v. Brown, 466 Mass. 676, 688-689, 1 N.E.3d 259 (2013), S.C., 474 Mass. 576 (2016)*. The matter is accordingly remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CRIMINAL NO. 2003-11293

COMMONWEALTH

vs.

KENTEL MYRONE WEAVER

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

INTRODUCTION

On April 26, 2006, a Suffolk County jury convicted the defendant, Kentel Myrone Weaver, on indictments charging first-degree murder in violation of G. L. c. 265, § 1 (Count 1), and possession of a firearm without a license in violation of G. L. c. 269, § 10(a) (Count 2). The trial judge, Neel, J., sentenced the defendant to a mandatory life term at MCI Cedar Junction on the murder conviction and a concurrent term of one year to one year and one day on the firearms conviction.

On June 1, 2011, following some delay in procuring the trial transcript, the defendant filed this Motion for New Trial alleging ineffective assistance of counsel based on trial counsel's failure to challenge the voluntariness of his confession and a violation of his Sixth Amendment right to a public trial. The defendant claims that the courtroom was closed to his family and other interested persons during jury selection. The parties agreed to a bifurcated review of the Motion for

New trial, focusing first on the public trial issue. For the reasons explained below, the motion is **DENIED**.

BACKGROUND

The following findings of fact are based on my review of the transcript of the empanelment proceedings, along with the credible evidence and reasonable inferences from testimony offered at the motion hearing.

A. Transcript of the Empanelment Proceedings

Jury selection began on Friday, April 7, 2006 in Courtroom 1015 of the Suffolk Superior Courthouse. Approximately ninety persons were assembled as members of the venire. The courtroom was crowded and every available seat was taken. Those members of the venire who could not be accommodated in available seats stood wherever they could find an open space around the courtroom. After the venire was sworn, the court addressed the crowding issue and explained the procedure as follows:

> If anybody has difficulty hearing me as we go along, please raise your hand and I'll be sure to speak up. There are a number of you who are standing and I apologize for that. The courtroom is almost but not quite large enough to accommodate everyone, and fairly shortly, as we move through the process, seats will open up for those of you who are standing and be sure to take those seats. But in the meantime, if anyone who's standing up needs to sit down, for whatever reason, just let the court officer know and we'll be sure to find a seat for you . . . I think for now, we will let everybody stay

> where they are. We won't have the jurors who are in the juror box stand and move to the back of the room because of circumstances that will become apparent in a minute. So we will - as I say, those of you who have been standing now for some period of time, people will be standing up hopefully and coming forward, if they're not already standing, and so what will happen is that [the clerk] will call individuals by panel and seat number and by name. If you hear your name and your panel and seat number, you should stand up, if you're not already standing, say here or present in a loud, clear voice so that our court reporter can record that you are here with us . . . and then come forward where I will talk with you a little for a few minutes at the side of the bench. As before, ladies and gentlemen, when seats open up, please take them if you are standing, and if any of you needs to sit down, let the officer know and we'll find a chair for you.

After the general inquiry, those standing were taken into the hall outside the courtroom to wait for open seats. The court then conducted individual voir dire of five prospective jurors, selecting only one juror, before recessing the proceedings for the day. The remaining members of the venire were instructed to return on Monday to continue the empanelment.

The following Monday, April 10, 2006, the empanelment continued in Courtroom 914 with the remainder of the venire. At the beginning of the process, the court noted that there are "roughly 90 individuals out in the hall waiting for us to resume our empanelment." The transcript does not reflect whether the entire venire was brought into the courtroom

before the empanelment continued. It appears, however, that the court repeated the procedure used on the first day of empanelment, instructing those members of the venire without seats in the courtroom to wait in the hall. Ten additional jurors were selected, bringing the total to eleven. As jurors were selected, they were seated in the jury box and remained in the courtroom throughout the process. After the morning recess, the court summoned the entire venire to the courtroom and addressed them as follows:

> I just want to say a word to those who have been -- to all of you who have been waiting out in the hallway, thank you for your patience. It's not the most comfortable place to wait and it allows us to get people seated in here where we have seats, but we're using the jury box now so we couldn't have people in there. So I kindly thank you for your patience. We'll continue calling individuals one by one as we go through this process.

From these remarks, I infer that the crowding had not abated sufficiently to allow the entire venire to be accommodated in the courtroom.

As the court prepared to resume the empanelment after the morning recess, the assistant district attorney alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom.

> Judge, just before when I believe you mentioned the out in the hallway when I was leaving the courtroom at the break, and I had shared this with Mr. Davis, I saw at least one member of the defendant's family outside, seated amongst all the prospective jurors. He

> was with two or three other individuals. My assumption is that they have some relation to the defendant. I don't know -- it's impossible for people to be in two places at once, and obviously none of the staff knew that had no reason to know, but this person testified on the grand jury, he testified at the Motion to Suppress. He's a trial witnesses' boyfriend, his name is Paul Smith. I just don't think it's appropriate that he be out in the hallway with any other friends or associates of the defendant. We've taken some steps to make sure that none of the victim's family is up here, although certain one of them are and they're down on the sixth floor, and I would just ask that we take what steps we can just to clear the hallways so we don't have any more issues than we already have to deal with.

Nothing in the record, however, suggests any safety or jury-tampering issue involving Mr. Smith or the other persons outside the courtroom. Nor did any party or the court voice any concern that the defendant's family was outside rather than inside the courtroom. Rather, the assistant district attorney's statement reflects a level of discomfort with their presence, even outside the courtroom. Echoing that point of view, defense counsel stated "If you want me to go out there and tell him to pick some other floor, I'd be glad to."[1] Jury

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[1] Counsel's response is consistent with his affidavit and hearing testimony that he believed that exclusion of the public from empanelment was constitutional. Prior to the Supreme Judicial Court's decision in Commonwealth v. Cohen, 456 Mass. 94, 116 (2010), the custom and practice of closing the courtroom to the public during empanelment, especially in murder cases, was prevalent. See, e.g., Commonwealth v. Shaheen, Memorandum

selection continued and one more juror was selected before the lunch break.[2] By that time, the venire was exhausted and the court ordered a new venire to select the last three jurors.

After the lunch break, the empanelment resumed with a fresh venire. The record does not reflect the number of prospective jurors brought to the courtroom for this third round of the empanelment. Based on the court's remarks to the venire, however, it appears that the courtroom was still crowded, though perhaps less so than earlier in the empanelment. At the conclusion of the general inquiry, the court explained that each prospective juror would be questioned individually and addressed the venire as follows:

> Ladies and gentlemen, that completes my questions to you. At this point I'm going to ask the officers to have those of you who were in the jury box stand and go to the back of the room and fill in whatever seats there are. If there are not enough seats and you're required to stand, seats will open up fairly quickly. But, if you need to sit down before that happens, don't be shy. Let us know and we will find a seat quicker.

During this final empanelment session, the remaining three jurors were selected. The empanelment tran-

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and Order Pursuant to Rule 1:28, 82 Mass. App. Ct. 1104, 2012 WL 2440006, at *1 (Jun. 28, 2012); Commonwealth v. Lavoie, 80 Mass. App. Ct. 546, 548, 552 (2011), *rev'd on other grounds*, 464 Mass. 83 (2013); Commonwealth v. Alebord, 80 Mass. App. Ct. 432, 435 (2011); Commonwealth v. Greineder, 458 Mass. 207, 226 (2010), *cert. granted and judgment rev'd*, 133 S. Ct. 55 (2012); Cohen, 456 Mass. at 102 & n12.

[2] One juror was excused, requiring the selection of three additional jurors.

script does not record any formal courtroom closure order, either verbal or written, or any objection to a closure order. Accordingly, I find that there were none. I also find that there were no "closed" signs posted on or about the courtroom doors and that the doors were never locked. At no time during the empanelment, did the court or court officers announce the availability of seats to those persons outside the courtroom.

B. Post-Trial Hearing[3]

Beginning on March 26, 2012, this court conducted an evidentiary hearing addressed solely to the courtroom closure issue. The defendant offered the testimony of his mother, Iris Weaver, Salvation Army Major Susan Dunigan and his trial attorney, Willie J. Davis. The Commonwealth called various court officers and two Boston police officers assigned to the case as homicide investigators.

On the first day of empanelment, the defendant's mother and other interested persons appeared at the courthouse to observe the trial proceedings. Ms. Weaver and Major Dunigan attempted to enter the courtroom to observe the empanelment but they were denied entry. A court officer told Ms. Weaver that the courtroom was "closed for jury selection." Although Ms. Weaver could not precisely describe this individual, she believed that the person was a white female.[4] She did not see any signs posted on the door or elsewhere

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[3] The trial judge, who has since retired from the bench, submitted an affidavit stating that he has no memory of the empanelment process that is not reflected in the transcript.

[4] One of the court officers assigned to the trial was a white female. That fact alone, however, does not establish that this court officer was the person who told Ms. Weaver that the courtroom was "closed for jury selection," but it buttresses her testimony.

indicating that the courtroom was "closed," but she remained outside the courtroom for the remainder of that day in deference to the court officer's directive. During a break in the proceedings, Ms. Weaver attempted to enter the courtroom but was told again that the courtroom was closed.

At the end of the day's proceedings, Ms. Weaver informed Attorney Davis that she had been refused entry into the courtroom. Ms. Weaver was especially concerned because her son, who at the time was only nineteen years old, was being tried for murder.[5] She had come to the courthouse at Attorney Davis' invitation because she desired to be present for all phases of the trial.

Attorney Davis did not recall being told of the exclusion. He did not object and, further, would not he have done so because he believed that a courtroom closure for empanelment was constitutional and that an objection would be futile. Because of his belief that the closure was constitutional, he did not discuss the matter with the defendant or suggest to him that his right to a public trial included the empanelment. I credit Attorney Davis' testimony.[6] Given counsel's state of mind, I find that the failure to object was not a

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[5] The defendant was sixteen years old at the time of his arrest on the murder indictment.

[6] The Commonwealth suggested that Mr. Davis' explanation was untrue because he was counsel for the defendant in Commonwealth v. Gordon, 422 Mass. 816, 823-24 (1996), where the public trial issue was addressed on appeal. The Gordon case involved multiple defendants and issues. The public trial issue was not raised by Attorney Davis on behalf of his client. I reject the suggestion that Attorney Davis is dishonest, concluding instead that in the ten or more years after the Gordon decision, he experienced an honest lapse of memory.

strategic choice. I find that the defendant was unaware that the courtroom was closed or that he had a right to a public trial.

Major Dunigan, who accompanied Ms. Weaver to the courthouse on April 7 and April 10 to offer moral and spiritual support, testified that a court officer informed both of them that the courtroom was "closed" during the jury selection. On the first day of the empanelment, a court officer told them to sit in the hallway outside the courtroom and wait until someone told them to come in. Major Dunigan followed what she understood to be the court officer's order and waited outside in the hall for the remainder of the day. While she waited in the hall, no court officer or anyone else ever approached her to invite her into the courtroom and she did not enter the courtroom at any time during the empanelment process.

Ms. Weaver and Major Dunigan both appeared at the courthouse again on April 10, 2006, the second day of the empanelment. As before, a court officer told them they could not enter the courtroom. They remained outside the courtroom in the hall and were never told that they could enter the courtroom.

The Commonwealth called court officers Candia Papile and Edward O'Neill, both of whom were assigned to the defendant's trial during jury selection. Understandably, however, given the passage of time, neither court officer had any specific memory of the empanelment or the case. They testified to the standard empanelment practice in murder cases which required a large venire, usually between sixty and 100 persons. Neither Courtroom 914 nor Courtroom 1015 is large enough to provide seats for a venire of that size. Because of the limited seating, some members of the venire would remain standing through the court's

introduction of the case and the statutory questions. Once this part of process was completed, those persons standing in the gallery would be taken to another courtroom or into the hall outside the courtroom while the court conducted the individual voir dire. If seats became available in the courtroom, court officers would shuttle those prospective jurors waiting outside into the courtroom. The courtroom doors were not locked at any time except during the lunch recess and after the conclusion of the day's business. The court officers all testified that they had never told any member of the public that the courtroom was "closed" for empanelment.[7]

Two Boston Police detectives, Sgt. Det. Thomas J. O'Leary and Sgt. Det. Paul McLaughlin, were present for all or most of the empanelment. Sgt. Det. O'Leary, the Commonwealth's primary investigator, testified that he was familiar with the layout of Courtrooms 1015 and 914 based on his experience with Suffolk County murder trials. He believed that approximately fifty to sixty people could sit in the gallery of each courtroom with an additional sixteen people in the jury box. Sgt. Det. Paul McLaughlin, the other member of the investigating team, was present for the majority of empanelment on both days. Because of his involvement with the case, he was familiar with Ms. Weaver and Major Dunigan. During the empanelment process, he frequently went in and out of the courtroom and saw both women in the hall. He acknowledged their presence but he never told them not to enter the courtroom.

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[7] The court notes, however, the prevalence of the practice as discussed above in note 1.

I credit the testimony of Ms. Weaver and Major Dunigan that a court officer told them that the courtroom was "closed," that they could not enter the courtroom until the empanelment was completed, and that they would be told when they could enter. A court officer gave this closure directive on both April 7 and April 10. I also find that they were never told they could enter the courtroom during the empanelment and that the courtroom remained closed to them and other members of the public for the duration of the empanelment.

The Commonwealth urges this court to reject Ms. Weaver's and Major Dunigan's testimony as biased and not credible. I decline to do so. Because of the importance of the fmding that their testimony is credible, I elaborate on my reasons.

First, this court is in a unique position to assess Ms. Weaver's credibility. As the judge who conducted the evidentiary hearing on the defendant's Motion to Suppress prior to the trial, I am familiar with the witness and her role in the arrest of her son for the murder of Germaine Rucker. Ms. Weaver, suspecting her son's complicity in the killing, embarked on an extraordinary course that ultimately led to her son's confession first and then his arrest for the crime.

Rather than shield her son from the reach of the law, Ms. Weaver gathered her family in their home to pray for her son's soul, marched her son to the Area B police station and, once there, insisted that he confess to the crime. A mother who forces a child to confess to the crime of murder because of some moral or religious imperative and without regard to the legal consequences is, in my judgment, beyond reproach on the matter of credibility. Cf. generally Mass. G. Evid. § 804(b)(3) (hearsay statements against pecuniary

interest bear indicia of trustworthiness). Thus, I am not persuaded by the Commonwealth's argument that her testimony should be discredited as biased and tainted by self-interest.

Second, the trial record supports the witnesses' claim that they were outside the courtroom during the empanelment. Though the assistant district attorney's report to the judge came on the second day of the empanelment, I find it is corroborative of the witnesses' claim that they were outside the courtroom on both days. It would be irrational to allow their presence on the first day of empanelment but deny them that right on the second day of the empanelment when the courtroom crowding was the same on both days.

Third, the defense witnesses' testimony was not rebutted by any of the Commonwealth's witnesses. The court officers' memory lapse, which to their credit was not embellished in any way favorable to the Commonwealth, leaves only the credible testimony of the defense witnesses. Of course, the court is not obliged to credit the defense witnesses' testimony simply because it is not directly rebutted. Nonetheless, it is a factor in weighing the credibility of their testimony.

Considering both the trial transcript and the witnesses' testimony, I find that a court officer, who cannot be identified at this time, closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment. The sole reason for the closure was the crowded condition in the courtroom. Because of the nature of the trial and in accordance with the usual practice, the court requested and received a large venire, between sixty and 100 persons. Even at the low end of this range, neither Courtroom 914 nor 1015 was large enough to

seat all members of the venire. Understandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors. Nonetheless, the court's deference to those interests resulted in the closure of the courtroom to the public.

DISCUSSION

The right to a public trial, granted by the Sixth Amendment to the United States Constitution, extends to pretrial proceedings, including jury selection. Cohen, 456 Mass. at 106 (2010), citing Presley v. Georgia, 130 S. Ct. 721, 723-24 (2010) (per curiam). The value of a public trial lies in the conviction that "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Commonwealth v. Bohmer, 374 Mass. 368, 380 (1978), quoting In re Oliver, 333 U.S. 257, 270 (1948). The right to a public trial is important, but not absolute. Commonwealth v. Martin, 417 Mass. 187, 193 (1994); see also Waller v. Georgia, 467 U.S. 39, 45 (1984), and cases cited.

A court may exclude the public from the courtroom but "only for a cause that outweighs the value of openness." Press Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984). A defendant who seeks a new trial on this ground bears the burden to demonstrate that the public was excluded from his trial. Cohen, 456 Mass. at 107-08. This burden requires a showing that the courtroom was closed in the "constitutional sense" which means that the closing was not trivial or *de minimis* and it occurred either explicitly or implicitly at the court's direction. Lavoie, 80 Mass. App. Ct. at 551. Because violation of the right to a public trial is structural error, the defendant need not show prejudice

to obtain a new trial. Commonwealth v. Downey, 78 Mass. App. Ct. 224, 229 (2010).

The right to a public trial, however, "like other structural rights, can be waived." Alebord, 80 Mass. App. Ct. at 438, and cases cited. Even if a defendant establishes an unconstitutional closure, the court must consider if he waived the right to a public trial if the facts warrant such an inquiry. Shaheen, 2012 WL 2440006, at *3. The Commonwealth bears the burden of establishing waiver. Lavoie, 80 Mass. App. Ct. at 553.

These principles establish the analytical framework for this court's consideration of the defendant's Motion for New Trial based on an alleged violation of the right to a public trial. The issues to be determined on the credible evidence offered by the parties are: (1) whether there was a constitutional closure of the courtroom; (2) if so, whether the closure was justified; and (3) whether the defendant waived his right to a public trial. See id. at 551. I address each of these issues in turn.

1. Constitutional Closure

The analysis of a closure issue requires first an assessment of whether the courtroom was closed in the "constitutional sense." A closure in the "constitutional sense" requires an "affirmative act" by the court intended to exclude the public. Cohen, 456 Mass. at 108, citing United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994). Affirmative acts include explicit orders by the court, Commonwealth v. Downey, 78 Mass. App. Ct. 224 (2010), posting of "closed" signs by court officers, Cohen, 456 Mass. at 108, and unauthorized exclusion orders from court officers, Owens v. United States, 483 F. 3d 48, 63 (1st Cir. 2007).

Though the closure in this case did not involve "closed" signs, locked doors, or an explicit closure order from the court, it nonetheless was a closure in violation of the defendant's right to a public trial. The closure occurred at the direction of court officers who told the family and others that the courtroom was "closed" for empanelment and that the public would be told when they could enter the courtroom. With this directive, members of the defendant's family and other interested persons were denied entry into the courtroom for the entirety of the empanelment. The exclusion by court officers establishes the "affirmative act" necessary for a constitutional closure. See Lavoie, 80 Mass. App. Ct. at 550, 551-52. Thus, the first factor in the analysis favors the defendant. Owens, 483 F.3d at 63.

The closure in this case was "not so trivial or *de minimis* that it falls entirely outside the range of closure in the constitutional sense." Cohen, 456 Mass. at 109. The defendant's mother and other interested members of the public were excluded for the entirety of the empanelment. In the particular circumstances of this case involving a murder defendant charged as a juvenile, the closure to his mother was especially problematic. His mother and her spiritual advisor were important symbols of support to this young murder defendant. See Cohen, 456 Mass. at 110 ("[A]n accused is at the very least entitled to have his friends, relatives and counsel present, no matter what offense may be charged."); see also Commonwealth v. Wolcott, 77 Mass. App. Ct. 457, 462-63.

2. Full Versus Partial Closure

The court must next determine "whether there was a full closure (applying to all members of the press and public) or a partial one limited to some subset of spectators." Lavoie, 80 Mass. App. Ct. at 551-52. "The

significance of this distinction is two-fold. If a closure is partial, the first factor to applied in analyzing whether the closure [was justified] is relaxed. While a full closure must advance an overriding interest that is likely to be prejudiced, a partial closure may be justified by a substantial reason." Id. at 552 (internal quotation marks and citations omitted). In addition, while a full closure must be supported by "contemporaneous findings adequate to support a full closure, in a partial closure case, the reviewing court may examine the record itself, even in the absence of formal or express findings by the judge." Id.

Here, there can be no doubt that there was a full closure of the courtroom during jury empanelment. "Where a court room is closed to some, but not all, spectators during jury selection, there is a partial rather than full closure of the court room." Commonwealth v. Caldwell, 459 Mass. 271, 282 (2011). Here, there is no indication that the courtroom was open to some limited number of spectators during empanelment, or that any spectators were in fact present in the courtroom. Indeed, the circumstances leading to the closure of the courtroom suggest the opposite was true; if there was insufficient space to accommodate Ms. Weaver and Major Dunigan, there would likewise be insufficient space to accommodate any other spectators. Thus, there was a full closure of the courtroom, rather than a partial closure. Contrast Cohen, 456 Mass. at 110 (partial closure where "the record makes clear that there were family members and some other individuals beyond the parties and counsel present in the court room during empanelment."); Commonwealth v. Martin, 39 Mass. App. Ct. 44, 49 (1995) (exclusion of defendant's family members, but not the press, amounted to partial closure).

3. Justification of the Closure

A "constitutional closure" does not, by itself, establish a violation of the right to a public trial. Whether in a given case the defendant's right to a public trial is validly circumscribed must be determined by applying the factors articulated in Waller: (1) whether the party seeking to close the hearing can advance an overriding interest that is likely to be prejudiced; (2) whether the closure is no broader than necessary to protect that interest; (3) whether the trial court considered reasonable alternatives to closing the proceedings, and (4) whether the trial court made findings adequate to support the closure. Waller, 467 U.S. at 48. Assessing these factors, I conclude that the closure in this case cannot be justified as a valid limitation of the defendant's Sixth Amendment rights.

First, courtroom crowding falls short as a justification for the closure at issue here. A full closure of the courtroom "must advance an overriding interest that likely to be prejudiced." Lavoie, 80 Mass. App. Ct. at 552, quoting Cohen, 456 Mass. at 111. Although Cohen, 456 Mass. at 113, suggested that crowding might justify the closing of the courtroom, it did not equate the need to minimize crowding with an "overriding interest." The court's openness to exclusion of the public to accommodate a large venire arose in the context of a partial closure rather than the total closure that occurred here.

The court's citation to Estes v. Texas, 381 U.S. 532 (1965) ("public trial guarantee is not violated if an individual member of the public cannot gain admission to a courtroom because there are no available seats"), likewise does not elevate the minimization of crowding to an "overriding interest." The reference to Estes merely recognized the propriety of a common sense

approach where a spectator arrives to find a filled-to-capacity courtroom. This case is different. The defendant's family and other interested persons did not appear at the door of an already filled courtroom only to be refused entry for lack of space. They were excluded as a matter of course, before any determination whether they could or should be accommodated in the courtroom for the empanelment.

Second, even if management of the crowded conditions in the courtroom rose to the level of "overriding interest," the closure in this case was far broader than necessary in both time and reach. Members of the defendant's family and all other members of the public were denied entry for the entirety of the empanelment, even after seating became available as members of the venire departed from the courtroom. See Rodriguez v. Miller, 82 Fed. App'x 715, 717 (2d Cir. 2003) ("Waller's second mandate-that the closure be no broader than required to protect the overriding interest at stake-necessarily applies to . . . the duration of the closure . . . .").

Third, there were reasonable alternatives to excluding the defendant's mother and the two other individuals seeking entry into the courtroom. For example, after jurors were chosen, it was possible to send them to the jury deliberating room rather than placing them in the jury box. This small change in the procedure would have relieved the pressure on space to allow defendant's family and others to be seated elsewhere in the courtroom while allowing those members of the venire who were standing to take the place of jurors selected for the trial. Also, the configuration of the courtroom certainly allowed space to be set aside, separate and apart from the venire, for the two women who had a particular interest in the

case to observe the proceedings. Cf. Boston Herald, Inc. v. Superior Ct. Dept. of the Trial Ct., 421 Mass. 502, 507 (1995) (First Amendment right of public access to judicial proceedings requires that "[t]he judge must make every effort to arrive at a reasonable alternative to closure."). Given the very small number of persons seeking entry into the courtroom, it would not have been difficult to accommodate both the public and the venire. The addition of these persons would not have made a difference in the crowded condition of the courtroom.

Fourth, it is undisputed that the court made no findings regarding the closure. The court was under no obligation to do so where defense counsel did not object to the closure and the court was likely unaware that courtroom had been closed to the defendant's family and friends. Nonetheless, it was clear, at least on the second day of empanelment, that interested members of the public were outside the courtroom because of the crowded conditions in the courtroom. Thus, the failure to make findings means that the closure cannot be justified. Wolcott, 77 Mass. App. Ct. at 464 ("Where there is a 'full' closure, as here, the trial judge must make his findings contemporaneous[ly] with the closure."); Commonwealth v. Baran, 74 Mass. App. Ct. 256, 292-93 (2009).

In summary, even though it was clear that Ms. Weaver and Major Dunigan were interested parties, the court made no attempt to accommodate them, or to explain why it was not possible to do so. Compare Martin, 417 Mass. at 196 (1994). Based on this court's review of the trial transcript and the hearing testimony, I conclude, therefore, that the Waller factors were not satisfied and the defendant's right to a public trial was not validly circumscribed.

4. Waiver

The Commonwealth argues that defense counsel's failure to object to the courtroom closure effected a waiver of the defendant's right to a public trial. See Mains v. Commonwealth, 433 Mass. 30, 33 n.3 (2000) ("Our courts have held that even structural error is subject to the doctrine of waiver" if the defendant fails to raise the issue in a timely manner.) The defendant counters that no waiver occurred because counsel, who was unaware of the public's right to be present in the courtroom for empanelment, inadvertently failed to object to the closure. In the alternative, defendant argues that the failure to object is ineffective assistance of counsel. The defendant also claims that the Commonwealth's waiver argument fails because he did not personally or knowingly waive his right to a public trial.

A waiver may occur in either of two ways: (1) affirmative waiver of rights; or (2) failure to raise the issue at trial or on appeal, a so-called "procedural" waiver. Lavoie, 464 Mass. at 87. The Commonwealth relies on the latter theory. The argument for "procedural waiver" based on trial counsel's failure to object to the courtroom closure is compelling but not dispositive. Favoring the Commonwealth's position is the court's observation in Cohen that "[f]ailure of a defendant or his counsel to raise an objection when first made aware of an alleged public trial violation is, at the very least, a very strong indication of waiver." Id. at 119 n.35, citing Commonwealth v. Wells, 360 Mass. 846 (1971). Also, in Lavoie, 464 Mass. at 88-89, decided after the submissions on this motion, the Supreme Judicial Court held that "counsel may waive, with or without the defendant's express consent, the right to a public trial during jury selection where the

waiver is a tactical decision as part of counsel's trial strategy." The appeal of the Commonwealth's argument, however, is undercut by two findings: (1) defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial; and (2) the defendant, unaware of his right to a public trial, did not intentionally waive this right.

These findings, based on the evidence presented at the motion hearing, place this case on dramatically different footing than that confronting the court in Lavoie. Lavoie validates reasonable tactical choices resulting in waiver of non-fundamental rights but it does not impose a blanket rule that any and all acts or omissions by counsel must be attributed to the defendant. The necessary deference to counsel's discretion in managing the conduct of the trial renders the defendant's knowledge of his right to a public trial and his acquiescence in counsel's tactical choice irrelevant. Id. at 89-90, quoting Taylor v. Illinois, 484 U.S. 400, 418 (1984) ("The adversary process could not function effectively if every tactical decision required client approval.").

Here, however, counsel's omission was not the product of tactical consideration. Where counsel, through inadvertence or ignorance of the law, fails to object or otherwise preserve the issue for appeal, Lavoie does not dictate waiver. Rather, the court must treat the lapse as any other unpreserved error and determine if it resulted in a substantial risk of miscarriage of justice, using the ineffective assistance of counsel standard. Id. at 89, citing Commonwealth v. Azar, 435 Mass 675, 686-87 (2002)("[W]hether we view the unpreserved claim of error . . . [by] utilizing the substantial risk of miscarriage of justice standard

or . . . by focusing on counsel's ineffectiveness in failing to object to the error, our approach is essentially the same, and . . . the result would be the same."). The issue for this court is whether the lapse constituted ineffective assistance of counsel.

The well-settled rule is that counsel is ineffective if his conduct "falls below that which might be expected from an ordinary fallible lawyer and prejudices the defendant by depriving him of an otherwise available, substantial ground of defence." Commonwealth v. Saferian 366 Mass. 89, 96 (1974). The threshold issue is the reasonableness of counsel's decision at the time it was made.

Given the state of the law in 2006 when this case was tried, counsel should have been aware of the defendant's right to have this family and other interested members of the public attend the empanelment. Though not as clearly articulated as today, the law at that time recognized a defendant's right to a public presence in the courtroom during jury selection. See Waller, 467 U.S. at 46; Gordon, 422 Mass. at 823. Counsel's failure to object to the courtroom closure, stemming from a misunderstanding of the law governing the defendant's right to a public trial, was therefore the product of "serious incompetency, inefficiency, or inattention" to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable. Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 722 (2012). Compare Lavoie, 464 Mass. 90-91 ("defense counsel provided a clear explanation of his practice of not objecting to the exclusion of family members or supporters of his clients in the court room during jury selection . . . . Moreover, he made a specific decision not to object at the defendant's trial. Given these facts . . . defense

counsel's tactical decision . . . was not manifestly unreasonable.") with Commonwealth v. Nwachukwu, 65 Mass. App. Ct. 112, 120 (2005) (defense counsel's mistaken instruction to defendant to wait outside courtroom during critical witness testimony in response to sequestration order indicated troubling "lack of awareness and appreciation . . . of a basic constitutional right" that, alongside other errors, amounted to ineffective assistance of counsel).

The conclusion that counsel's failure to object was not objectively reasonable does not resolve the issue. The court must also determine if the lapse caused prejudice warranting a new trial. Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 344 (1994). Of course, the defendant is prejudiced in the sense that he cannot now claim the benefit of the presumption of prejudice from the structural error that occurred during the empanelment. However, the option of finding prejudice on that basis alone is foreclosed given dicta in Commonwealth v. Dyer, 460 Mass. 72 &, 737 (2011), suggesting that prejudice must flow from a source other than the waiver itself. The Dyer court found no prejudice because the defendant "point[ed] to no factors suggesting, notwithstanding the waiver, that a substantial likelihood of miscarriage of justice occurred." Id. The court adopted this approach after expressly declining to apply the "structural error" analysis to unpreserved claims. Id. at 736. The defendant has not offered any evidence or legal argument establishing prejudice as defined in Dyer.

Finally, this court rejects the defendant's claim, based on Commonwealth v. Edward, 75 Mass. App. Ct. 162, 173 n.13 (2009), that waiver requires a defendant's personal, knowing assent. First, the court in Lavoie, 464 Mass. at 88, n. 9, implicitly overruled

Edwards on this point. Second, no personal assent is necessary because the right to a public trial is not among that very short list of fundamental rights, including whether to plead guilty, waive the right to a jury trial, testify, take an appeal or waive the right to counsel requiring the defendant's explicit waiver. Dyer, 460 Mass. at 736.

CONCLUSION AND ORDER

For the reasons set forth above, the defendant's Motion for New Trial on the ground that his right to a public trial was violated is **DENIED**.

February 22, 2013

/s/
Geraldine S. Hines
Justice of the Superior Court

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 2 - 2016
OFFICE OF THE CLERK

No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant asserting ineffective assistance of counsel that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, or whether prejudice is presumed in such cases.

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STATEMENT

1. In 2006, a Massachusetts jury convicted Petitioner of first-degree murder by deliberate premeditation in violation of Mass. Gen. Laws ch. 265, § 1, and of unlawful possession of a firearm in violation of Mass. Gen. Laws ch. 269, § 10(a). Pet. App. 1a, 5a, 42a. The convictions arose from the fatal shooting of fifteen-year-old Germaine Rucker in 2003. Pet. App. 1a. The evidence at trial included testimony that Petitioner admitted to police that he shot the victim. Pet. App. 1a, 4a. Jurors also heard, among other things, that a witness saw a young man carrying a pistol and discarding a hat while fleeing the area, that the pistol described was consistent with the type of gun that would have been used to shoot the victim, and that the hat contained DNA matching Petitioner's profile and resembled one that police previously saw Petitioner wearing. Pet. App. 2a-4a.

2. In 2011, Petitioner moved for a new trial, claiming that his trial counsel was ineffective in two ways. Pet. App. 1a-2a, 42a. The first was that the attorney did not adequately pursue Petitioner's claim that his admissions to police were coerced, and the second was that the attorney failed to object to a closure of the courtroom during jury selection. Pet. App. 1a-2a, 42a. In light of the trial judge's retirement, the parties agreed to bifurcate the motion, with the two ineffective-assistance claims being assigned to different judges. Pet. App. 2a, 27a, 42a-43a, 48a n.3.[1]

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[1] Petitioner is incorrect in stating that his motion for a new trial was filed "[f]ollowing an unsuccessful direct appeal." Pet.

a. The judge assigned to hear the courtroom-closure ineffectiveness claim held an evidentiary hearing. Pet. App. 38a, 43a-54a. She found as follows.

During the two days of jury selection in Petitioner's case, the courtrooms utilized were very crowded. Pet. App. 38a-39a, 43a-47a, 53a. They were not "large enough to provide seats" for the "large venire[s]" required for murder cases, which are "usually between sixty and 100 persons." Pet. App. 50a. On the first day, approximately ninety venire members assembled, and "every available seat" was taken. Pet. App. 38a-39a, 43a. The trial judge commented that "'the courtroom is almost but not quite large enough to accommodate everyone,'" and he referred to people "standing [] for some period of time." Pet. App. 43a-44a. "[T]hose standing were taken into the hall . . . to wait for open seats." Pet. App. 44a. On the second day, "the courtroom crowding was the same," "though perhaps less so" "[a]fter the lunch break." Pet. App. 44a-45a, 47a, 53a. When the proceedings began, the trial judge thanked "all of [those who had] been waiting out in the hallway," as it was "not the most comfortable place to wait." Pet. App. 44a-45a.

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7. Rather, it was filed and disposed of during the pendency of his direct appeal in accordance with Massachusetts procedure. Pet. App. 2a. *See* Mass. Gen. Laws ch. 278, § 33E (appeals and new-trial motions in first-degree-murder cases); Mass. R. App. P. 15(d) (new-trial motions in first-degree-murder cases), 19(d) (appeals and new-trial motions in first-degree-murder cases); Mass. R. Crim. P. 30 (post-conviction motions), 38(c) (judicial unavailability following conviction); Mass. Super. Ct. R. 61A (post-conviction motions and judicial unavailability).

On each of the two days, Petitioner's mother and at least one other interested person were denied entry to the courtroom by a court officer who told them it was closed for jury selection. Pet. App. 39a, 48a-53a, 56a. "[T]he courtroom remained closed to them and other members of the public for the duration of the empanelment." Pet. App. 52a-54a, 56a. "The sole reason . . . was the crowded condition in the courtroom." Pet. App. 39a, 53a.

At the end of the first day, "[Petitioner's mother] informed [defense counsel] that she had been refused entry." Pet. App. 49a. Then, "after the morning recess [on the second day], the [prosecutor] alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom." Pet. App. 45a, 60a. He specifically referenced one individual who had "'testified on the grand jury,'" was "'a trial witness['s] boyfriend,'" and was "'seated amongst all the prospective jurors'"—adding that he did not "think it [was] appropriate that [the individual] be out in the hallway with any other friends or associates of the defendant.'" Pet. App. 45a-46a. "Echoing [the prosecutor's] point of view, defense counsel stated, 'If you want me to go out there and tell [the individual] to pick some other floor, I'd be glad to.'" Pet. App. 46a (noting that "[n]othing in the record, however, suggest[ed] any safety or jury-tampering issues involving" such individuals).

"[T]he defendant was unaware that the courtroom was closed or that he had a right to a public trial." Pet. App. 50a, 62a. And, "[b]ecause of his belief that the closure was constitutional, [defense counsel] did not discuss the matter with the

defendant[,] suggest to him that his right to a public trial included the empanelment," or object. Pet. App. 39a-40a, 46a-49a & n.1, 60a. "[T]he failure to object was not a strategic choice." Pet. App. 49a-50a, 62a. "Nor did any party or the court voice any concern that the defendant's family was outside rather than inside the courtroom." Pet. App. 46a. "Understandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors." *Id.*

b. The motion judge arrived at the following conclusions. "[T]here was a full closure of the courtroom, rather than a partial closure," and it was not trivial or de minimis. Pet. App. 39a, 56a-58a. The closure could not "be justified as a valid limitation of the defendant's Sixth Amendment rights" under the test established by *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Pet. App. 39a, 56a, 58a-60a.[2] But "the closure did not prejudice the defendant's case" Pet. App. 39a.

"[T]he defendant, unaware of his right to a public trial, did not intentionally waive this right." Pet. App. 62a. And "[c]ounsel's failure to object to the courtroom closure, stemming from a misunderstanding of the law governing the defendant's right to a public trial, was [] the product of 'serious incompetency, inefficiency, or inattention'

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[2] Under the *Waller* test, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 48.

to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable." Pet. App. 40a, 63a-64a (quoting *Commonwealth v. Chleikh*, 82 Mass. App. Ct. 718, 722, 978 N.E.2d 96, 100 (2012)). But Petitioner did not "offer[] any evidence or legal argument establishing prejudice" in the sense of "a substantial likelihood of a miscarriage of justice." Pet. App. 40a, 64a. Thus, relief was denied. Pet. App. 43a, 65a.

c. Petitioner lodged an appeal of the motion judge's decision. Pet. App. 2a. It was consolidated with his direct appeal of his convictions, as well as an appeal from a decision denying his coerced-admission ineffectiveness claim, in the Massachusetts Supreme Judicial Court ("SJC"). *Id.* The SJC addressed Petitioner's challenges in a July 20, 2016 opinion. Pet App. 1a-41a.

At the outset of its analysis rejecting the coerced-admission ineffectiveness claim, the SJC set forth Massachusetts's distinct standard for evaluating ineffective assistance claims on direct review of first-degree-murder convictions:

> Where a defendant has been convicted of murder in the first degree, the court evaluates a claim of ineffective assistance [] to determine whether "there exists a substantial likelihood of a miscarriage of justice[.]" The court asks "[1] whether there was an error in the course of trial (by defense counsel, the prosecutor, or the judge), and, [2] if there was, whether that error was likely to have influenced the jury's conclusion[.]" This standard is more favorable than the constitutional standard for

> determining ineffectiveness of counsel. The court considers the defendant's claim "even if the action by trial counsel does not constitute conduct 'falling measurably below that ... of an ordinary fallible lawyer[.]' "

Pet. App. 30a-31a (citations omitted; third, fourth, and sixth alterations in original) (quoting *Commonwealth v. Williams*, 453 Mass. 203, 204, 900 N.E.2d 871, 874 (2009), *Commonwealth v. Lang*, 473 Mass. 1, 19, 38 N.E.3d 262, 276 (2015) (Lenk, J., concurring), and *Commonwealth v. Gonzalez*, 443 Mass. 799, 808-09, 824 N.E.2d 843, 852 (2005), respectively).[3] The SJC also noted the finding of the judge who denied that claim—"after three days of evidentiary hearings"—that Petitioner's "trial counsel [was] a very experienced and highly regarded defense attorney" who "ha[d] practiced law for over forty years and handled over one hundred murder trials at the trial and appellate level." Pet. App. 27a-28a.

With respect to the courtroom-closure ineffectiveness claim, the SJC described certain findings of the motion judge as "supported by the evidence." Pet. App. 38a. Included were findings regarding the crowding, the closure, and the failure to object. *Id.* The court also agreed that there was "a full, rather than partial, closure." Pet. App. 39a. It noted, but did not expressly ratify, the judge's

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[3] As the SJC's opinion in this case shows, the standard applies equally to appeals of motions for a new trial that are consolidated with the direct appeal. Pet. App. 30a-31a. *See, e.g.*, *Commonwealth v. Spray*, 467 Mass. 456, 471-72, 5 N.E.3d 891, 904-05 (2014).

determination that the *Waller* test was unmet. Pet. App. 38a.

The SJC recognized that a public-trial violation "constitutes structural error," and that "[w]here a meritorious claim of structural error is timely raised, the court presumes 'prejudice, and reversal is automatic.'" Pet. App. 39a (quoting *Commonwealth v. Jackson*, 471 Mass. 262, 268, 28 N.E.3d 437, 442 (2015)). But the SJC also affirmed that:

> "Where the defendant has procedurally waived his Sixth Amendment public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply."

Pet. App. 40a (quoting *Commonwealth v. LaChance*, 469 Mass. 854, 856, 17 N.E.3d 1101, 1104 (2014)). The court declined Petitioner's invitation to "revise the *LaChance* rule" and presume prejudice. *Id.*

In the SJC's view, the motion judge "correctly determined that counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable,' but that the defendant otherwise failed to show that trial counsel's conduct caused prejudice warranting a new

trial." *Id.* It noted that Petitioner "d[id] not dispute [on appeal] that he failed to demonstrate prejudice," and "ha[d] not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." Pet. App. 40a-41a.

Pursuant to the special provisions of Massachusetts law governing first-degree-murder appeals—which "require[the SJC] 'to consider all issues apparent from the record, whether preserved or not'" and give it "extraordinary power"—the court "reviewed the record," but "discern[ed] no basis on which to reduce the verdict of murder in the first degree or to order a new trial." Pet. App. 2a, 8a, 41a (citing Mass. Gen. Laws ch. 278, § 33E, and quoting *Commonwealth v. Randolph*, 438 Mass. 290, 294, 780 N.E.2d 58, 64 (2002)).[4] The SJC affirmed Petitioner's convictions and the denial of both parts of his motion for a new trial. Pet. App. 2a, 8a, 41a.[5]

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[4] While Mass. Gen. Laws ch. 278, § 33E refers to first-degree-murder cases as "capital cases," "since capital punishment is not a penalty currently recognized by the laws of the Commonwealth, [those convicted] actually are not 'capital' defendants within the ordinary meaning of the term." *Dickerson v. Attorney Gen.*, 396 Mass. 740, 741-44 & n.1, 488 N.E.2d 757, 758-60 & n.1 (1996) (describing broad plenary review under the statute).

[5] The SJC, however, remanded the case to the trial court so that it could correct the mittimus to reflect that Petitioner's "life sentence . . . carrie[d] with it the opportunity for parole consideration after fifteen years" in light of his juvenile status. Pet. App. 41a.

ARGUMENT

Petitioner asks this Court to address whether a defendant may be required to prove prejudice in order to obtain relief on a claim that his counsel provided ineffective assistance resulting in a structural error. While he maintains that the lower courts are deeply divided on that issue, the division is not so pronounced. The Massachusetts SJC's view that prejudice is not to be presumed, but must be shown by the defendant, is consistent with this Court's precedent and rightly prevails. The few courts that purportedly disagree have already begun correcting their error or can do so, or are not actually in conflict with the SJC. This Court's intervention is therefore unnecessary.

Moreover, contrary to Petitioner's contention, this case does not present a clean vehicle for addressing the question presented. A ruling for Petitioner here might not lead to relief on remand in the SJC. That court did not expressly find counsel's performance inadequate under the federal standard. Instead, the court seems to have applied a more protective state standard. Facing on remand the application of a federal presumptive-prejudice rule, the SJC might choose to decide in the first instance whether counsel's performance was actually inadequate under federal law—and reject that claim.

I. Any disagreement among the lower courts is overstated.

The Petition overstates the extent of disagreement in the lower courts as to whether a defendant is required to prove prejudice in order to

establish an ineffectiveness claim involving a structural error. Most federal appellate courts and state high courts to have addressed the issue, like the SJC, recognize such a requirement. They understand what this Court has made clear—that courts should not conflate two distinct issues. One is whether to forgo a harmlessness analysis upon proof of a structural error, and the other is whether to presume the prejudice that is an essential element of establishing a denial of effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Meanwhile, decisions that Petitioner cites for a contrary view reflect the conflation error that this Court has warned against, have been called into doubt, or did not espouse such a view at all.

1. The prevailing view among federal circuit courts and state high courts is that prejudice must be shown. *See United States v. Gomez*, 705 F.3d 68, 80 (2d Cir. 2013); *Purvis v. Crosby*, 451 F.3d 734, 738-44 (11th Cir. 2006); *Reid v. State*, 286 Ga. 484, 487-89, 690 S.E.2d 177, 180-81 (2010); *Commonwealth v. LaChance*, 469 Mass. 854, 856-60, 17 N.E.3d 1101, 1104-07 (2014); *People v. Vaughn*, 491 Mich. 642, 671-74, 821 N.W.2d 288, 306-08 (2012); *Commonwealth v. Rega*, 620 Pa. 640, 657, 70 A.3d 777, 787 (2013); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989); *State v. Pinno*, 356 Wis.2d 106, 151-56 & nn.24-28, 850 N.W.2d 207, 229-32 & nn.24-28 (2014).

2. These decisions are in harmony with this Court's admonition that forgoing harmlessness review must be kept distinct from presuming *Strickland* prejudice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-51 (2006). The reasons

make sense: "the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*." *Id.* at 150 & n.5 (distinguishing "[a] choice-of-counsel violation," which "occurs *whenever* the defendant's choice is wrongfully denied"); *see also id.* at 147 ("The requirement . . . arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced."); *cf. Premo v. Moore*, 562 U.S. 115, 128-30 (2011) (stating, within discussion of performance prong of ineffectiveness test, that the "prejudice" or "harmless-error" analysis applied on direct appeal in *Arizona v. Fulminante*, 499 U.S. 279 (1991), "presumes a constitutional violation, whereas *Strickland v. Washington* seeks to define one," and "*Fulminante* says nothing about prejudice for *Strickland* purposes"); *Lockhart v. Fretwell*, 506 U.S. 364, 370 n.2 (1993) ("Harmless-error analysis is triggered only after the reviewing court discovers that an error has been committed. And under [*Strickland*], an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice.").[6]

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[6] To be sure, certain of this Court's structural-error cases

Indeed, this Court requires a greater degree of prejudice for a defendant to establish ineffectiveness than to overcome harmlessness. *See Kyles v. Whitley*, 514 U.S. 419, 436 & n.9 (1995) (explaining that more is required to establish prejudice under *Strickland* than harm under the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), applied in habeas corpus actions); *United States v. Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (explaining that more is required to show harm under *Brecht* than harm under the standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), applied on direct review); *id.* at 86 (Scalia, J., concurring) (observing that *Strickland* prejudice standard is "less defendant-friendly" than harmlessness standards of *Brecht* and *Chapman*); *cf. Premo*, 562 U.S. at 129-30 (explaining that the "prejudice" or "harmless-error" standard applied "on direct review following an acknowledged constitutional error" "cannot apply to determinations of whether inadequate assistance of counsel prejudiced a defendant who entered a plea agreement"). So, presuming that an error is harmful does not necessarily warrant treating counsel's failure to raise the error as prejudicial for ineffectiveness purposes.

Moreover, in the limited circumstances in which this Court has held that prejudice may be

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have used the term "prejudice." *See, e.g., Waller v. Georgia*, 467 U.S. 39, 49-50 & n.9 (1984); *Tumey v. Ohio*, 273 U.S. 510, 524, 530 (1927). But there is no doubt that they were discussing what is now more commonly referred to as a "harmlessness" inquiry—that is, an evaluation of whether to excuse a demonstrated constitutional violation on the ground that its impact was limited.

presumed for ineffective-assistance claims, it has done so based on factors different from those found to warrant dispensing with a harmlessness inquiry. The Court has relied on a variety of rationales for forgoing the harmlessness inquiry for structural errors, including "the difficulty of assessing the effect of the error," "fundamental unfairness," "the irrelevance of harmlessness," and the extent to which the error bears on the framework of the trial. *Gonzalez-Lopez*, 548 U.S. at 148-50 & n.4. By contrast, this Court has presumed prejudice in the ineffective-assistance context only where the nature of the error creates a high likelihood of prejudice. *See United States v. Cronic*, 466 U.S. 648, 658-66 (1984) (explaining that a showing of prejudice has been found unnecessary where there were "circumstances that [we]re so likely to prejudice the accused that the cost of litigating their effect in a particular case [was] unjustified"); *accord Strickland*, 466 U.S. at 692-93 (adding that "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent").[8] And in fact, unlike

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[8] Petitioner correctly states that "*Strickland* itself identifies certain contexts in which prejudice is presumed—such as when defense counsel 'is burdened by an actual conflict of interest.' That is because, 'it is difficult to measure the precise effect on the defense' of conflicted representation." Pet. 20 (citations omitted) (quoting 466 U.S. at 692). However, *Strickland* does not suggest that prejudice should be presumed whenever it would be difficult to measure an error's effect. The Court singled out an "actual conflict" claim as "[o]ne type" deserving of distinct treatment for a number of reasons, only one of which was the difficulty of measuring the effect. *Strickland*, 466 U.S. at 692. Others included the fact that conflicted counsel "breaches the duty of loyalty," "the obligation of counsel to avoid

its approach to structural error and harmlessness, this Court has not instructed the lower courts to forgo entirely considering the extent to which counsel's conduct affected the trial; rather, it has simply held that, in certain circumstances, an adverse effect is so likely that it may be presumed.[9]

3. Petitioner focuses on six decisions that, according to him, reflect the view that a defendant need not show prejudice when claiming ineffectiveness involving an underlying structural error: *Owens v. United States*, 483 F.3d 48, 63-66 & n.13 (1st Cir. 2009); *Johnson v. Sherry*, 586 F.3d 439, 447-48 (6th Cir. 2009); *Winston v. Boatwright*, 649

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conflicts of interest," and "the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts." *Id.* "Even so," this Court added, "the rule is not quite [a] per se rule of prejudice"; "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980)).

[9] In addition, there are differences among structural errors and the manner in which they are to be remedied. For example, in *Waller*, the Court agreed that "the defendant should not be required to prove specific prejudice in order to obtain relief," but concluded that "the remedy should be appropriate to the violation" and a new suppression hearing would be sufficient, at least initially. 467 U.S. at 49-50 & n.9 (adding that "[a] new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties"). This provides a further reason why the various presumptions of prejudice in the harmlessness context cannot be mechanically carried over to the *Strickland* context.

F.3d 618, 632-34 (7th Cir. 2011); *McGurk v. Stenberg*, 163 F.3d 470, 475 & n.5 (8th Cir. 1998); *Littlejohn v. United States*, 73 A.3d 1034, 1043-44 (D.C. 2013); *State v. Lamere*, 327 Mont. 115, 124-26 ¶ 28, 112 P.3d 1005, 1013-14 ¶ 28 (2005). Pet. 11-15. Three of the six involve the conflation error described above—but one is nearly two decades old and has already begun to be corrected by the circuit, and the others can be left to the lower courts to correct. The remaining three of the six actually reflect no disagreement with the prevailing view.

a. The Eighth Circuit's 1998 *McGurk* decision—which did not even involve an underlying public-trial claim—was based on the conflation error described above, but the court has begun to rectify its own mistake. 163 F.3d at 475 & n.5. The *McGurk* panel viewed *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), as "dictat[ing] the conclusion that the Nebraska Court of Appeals erred in requiring a showing of actual prejudice [from counsel's failure to inform his client that he was entitled to a trial by jury]." 163 F.3d at 475 & n.5. However, *Sullivan* announced only that "harmless-error analysis does not apply" to a "'structural defect'" involving "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt." 508 U.S. at 282-82 (quoting *Fulminante*, 499 U.S. at 309). *Sullivan* did not concern prejudice for ineffectiveness. *Id.*

The Eighth Circuit has since narrowly confined *McGurk*. In fact, the court declined to apply its holding to a habeas claim alleging that trial counsel was ineffective for consenting to a courtroom closure. *Addai v. Schmalenberger*, 776 F.3d 528, 535-36 (8th Cir. 2015) (concluding that "requiring

[the petitioner] to demonstrate prejudice would not have been contrary to or an unreasonable application of clearly established federal law," where "[he had] failed to demonstrate clearly established federal law"). The court reasoned in part that "*McGurk* involved the right to a jury trial—not the temporary closure of the courtroom"; that the *McGurk* opinion "expressly noted 'the extremely limited circumstances in which it is appropriate to presume prejudice'"; and that both prior and subsequent Eighth Circuit decisions were in tension with *McGurk*. *Id.* *See also United States v. Kehoe*, 712 F.3d 1251, 1254-55 (8th Cir. 2013) (rejecting argument that "defense counsel's decision to select the jury in a racially discriminatory manner should result in a presumption of prejudice," "[n]otwithstanding . . . *McGurk*"); *Charboneau v. United States*, 702 F.3d 1132, 1138 (8th Cir. 2013) (finding *McGurk* inapplicable to habeas claim alleging ineffectiveness of appellate counsel for failure to raise a public-trial issue).[10]

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[10] Indeed, *McGurk*'s indication that a presumption of prejudice is "dictate[d]" by this Court's precedent, 163 F.3d at 475, seems difficult to reconcile with *Addai*'s conclusion that requiring a showing of prejudice is not "contrary to" any "clearly established federal law," 776 F.3d at 535-46. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) (Stevens, J., for the majority) (essentially equating precedent that is "clearly established" with that which is "dictated" under *Teague v. Lane*, 489 U.S. 288 (1989)); *id.* at 379-84 (Stevens, J., concurring) (same); *id.* at 405-06, 412-13 (O'Connor, J., for the majority) (explaining that "[a] state-court decision will certainly be contrary to [this Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," such as where the state court calls

Owens and *Littlejohn* reflect the same conflation error and likewise are subject to correction. Like the *McGurk* court, the First Circuit in *Owens* maintained that, "[i]f . . . it is impossible to determine whether a structural error is prejudicial, *Sullivan*, 508 U.S. at 281, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice." 483 F.3d at 64-65 & n.13 (parallel citation omitted) (explaining, where defendant alleged a public-trial violation, that the court "believe[d] that [the] showings of prejudice [for ineffective assistance and excusing procedural default] overlap, and [the court would] resolve them simultaneously"). And in *Littlejohn*, the District of Columbia's Court of Appeals held that "[r]equiring Littlejohn to prove actual prejudice as a result of trial counsel's waiver of his public trial right would be inconsistent with the Supreme Court's holdings that prejudice is presumed when the constitutional error is a structural defect . . . ." 73 A.3d at 1043-44.

But this Court need not step in to correct these isolated errors. As the Eighth Circuit's example suggests, these courts can correct themselves, based on this Court's precedents.

b. Petitioner's three remaining cases do not reflect disagreement with the prevailing view of federal law. *See Johnson*, 586 F.3d at 447-48; *Winston*, 649 F.3d at 627-34; *Lamere*, 327 Mont. at 124-26 ¶ 28, 112 P.3d at 1013-14 ¶ 28.

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for a defendant to make a higher showing of prejudice on an ineffectiveness claim than *Strickland* requires).

The Sixth Circuit in *Johnson* did not hold that prejudice for ineffective-assistance purposes should be presumed where an attorney fails to object to a violation of the right to a public trial. 586 F.3d 439. Rather, the court stated that, "[b]ecause the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed." *Id.* at 447. For that proposition the court cited portions of *Waller* and *Gonzalez-Lopez* dealing with whether prejudice or harm must be shown before a demonstrated public-trial violation can be remedied. *Id.* (citing *Waller*, 467 U.S. at 49 n.9, and *Gonzalez-Lopez*, 548 U.S. at 149 n.4). Critically, the *Johnson* court next stated this: "Consequently, if evidence reveals that counsel's failure to object fell below an objective standard of reasonableness, there is a *strong likelihood* that counsel's deficient performance *would be deemed prejudicial*." *Id.* (emphasis added). The court confirmed that it was not mandating a presumption of prejudice for ineffectiveness purposes by remanding the case "for an evidentiary proceeding to determine whether the trial closure was justifiable, whether trial counsel was constitutionally ineffective for failing to object, and *whether the cause and prejudice components of Johnson's public trial claim can be satisfied*." *Id.* at 447-48 (emphasis added).[11] And the Sixth Circuit has since confirmed *Johnson*'s limited reach. *See Ambrose v. Booker*, 684

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[11] The court was not suggesting that prejudice must be assessed only as part of the cause-and-prejudice analysis for procedural default and not for ineffective assistance. As it explained, it saw the two prejudice inquiries as "'overlap[ping].'" *Johnson*, 586 F.3d at 447-48 & n.7 (quoting *Owens*, 483 F.3d at 64 n.13).

F.3d 638, 651 (6th Cir. 2012) (describing *Johnson* as "suggest[ing] a 'strong likelihood' that if the performance was deficient, it would be deemed prejudicial, reasoning in part that the right to a public trial is a structural guarantee," and noting the "tentative and conditional nature of this language").[12]

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[12] Numerous judges in the Sixth Circuit have recognized the same. *See, e.g.*, *Hunter v. Bergh*, 2015 WL 5139358, at *5 (E.D. Mich. 2015) (unpublished) (Levy, J.) ("Petitioner relies on language in [*Johnson*] to argue that prejudice should be presumed based on the violation of his right to a public trial. But the Sixth Circuit has already rejected that notion [in *Ambrose*]."), *certificate of appealability denied*, 2016 WL 790966, at *3 (6th Cir. 2016) (unpublished) (noting that petitioner "ha[d] not provided any Supreme Court precedent requiring such a presumption" of prejudice); *Durr v. McLaren*, 2015 WL 927455, at *7-9 (E.D. Mich.) (unpublished) (Roberts, J.) (finding *Johnson* not controlling in part because it "did not definitively resolve the prejudice issue," its presumption-of-prejudice statement was dicta, and it is at odds with *Premo*), *certificate of appealability denied*, 2015 WL 5101751, at *2-3 (6th Cir. 2015) (unpublished) (focusing on lack of deficient performance in addressing ineffective-trial-counsel claim, and lack of prejudice in addressing ineffective-appellate-counsel claim); *Harrison v. Woods*, 2014 WL 6986172, at *7-9 (E.D. Mich. 2014) (unpublished) (Borman, J.) (finding *Johnson* not to control for same reasons stated in *Durr* district-court decision), *certificate of appealability denied*, 2015 WL 4923099, at *2 (6th Cir. 2015) (unpublished) (stating that "the fact that a structural error might have occurred does not mean that counsel's performance presumptively prejudiced [the petitioner]," with citation to *Premo*, and that "the Supreme Court has never held that an attorney's failure to object to the closure of the courtroom is" among the "limited circumstances" in which "*Strickland* prejudice is considered so likely that it is presumed"); *Porter v. Tribley*, 2014 WL 6632123, at *7-9 (E.D. Mich. 2014) (unpublished) (Goldsmith, J.) (finding *Johnson* not binding for same reasons provided in *Durr* district-court

Nor has the Seventh Circuit adopted Petitioner's rule. *Winston* did not involve public-trial issues, but instead resolved a state prisoner's habeas claim that his counsel was ineffective for striking prospective jurors based on gender in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). 649 F.3d at 632-34. To be sure, the court did fault the Wisconsin state court for "fail[ing] to see the *link* between the analysis of prejudice in the structural error cases and the analysis of prejudice in the *Strickland* line of cases." *Id.* at 632-33 (emphasis added).

However, far from issuing a sweeping ruling that equated harm and *Strickland* prejudice or that applied to all structural errors, the Seventh Circuit undertook a lengthy analysis of the nature of *Batson* error and concluded that, where defense counsel causes a *Batson* violation, the risk of prejudice is so great that it should be presumed under the *Cronic* line of cases. *See id.* at 633 (citing *Cronic* and its progeny and concluding that "[t]he same result, in our view, must hold for *Batson* errors"). Accordingly, the case is best read as recognizing a new category of cases in which prejudice is so likely that it can be presumed under *Strickland* and *Cronic*—not a holding that prejudice simply should be presumed any time counsel's deficiency results in a structural error. *See id.* And indeed, Respondent has uncovered no decision within or outside the Seventh Circuit that has since cited *Winston* for the notion that *Strickland* prejudice must be presumed in

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decision), *certificate of appealability denied*, No. 14-2523, slip op. at 3 (6th Cir. June 1, 2015) (unpublished) ("[T]he Supreme Court has never held that an attorney's failure to object to the closure of the courtroom results in a presumption of *Strickland* prejudice.").

circumstances involving an underlying structural error.[13]

Finally, in *Lamere*, defense counsel was alleged to have been inattentive not to a public-trial issue, but to potential bias issues in jury selection. 327 Mont. at 124-26 ¶ 28, 112 P.3d at 1013-14 ¶ 28. And the Montana Supreme Court offered no indication that its holding was based on its view of federal law. *Id.* The court cited only a state-court opinion concerning the presumption of prejudice or harm that arises when a structural error has been shown, and it extended the concept to the ineffective-assistance context. *Id.* (citing two state decisions that concerned harmlessness, not prejudice for ineffectiveness, and relied largely on state law).

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[13] Of course, the claimed structural error at issue in this case, unlike the *Batson* error at issue in *Winston*, is not the type of error that is so prejudicial to the trial's outcome that prejudice should be presumed under *Cronic*. That said, contrary to Petitioner's contentions, it would not be *impossible* for any defendant to prove prejudice from a failure to object to a courtroom closure during jury selection. A defendant can submit affidavits from his counsel and himself. He can also offer sworn statements from venire members, to the extent permitted. *See, e.g.*, *Commonwealth v. Rice*, 427 Mass. 203, 207-08, 692 N.E.2d 28, 31-32 (1998); 75B Am. Jur. 2d Trial § 1640: *Bias, Prejudice, or Disqualification Not Disclosed on Voir Dire*. A defendant can further provide an analysis of the questions asked in the selection process and their relationship to the issues in the case. However, Petitioner below "[did] not dispute that he failed to demonstrate prejudice" or "advance[] any argument or demonstrate[] any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." Pet. App. 39a-41a, 64a.

In sum, a few tribunals' misunderstanding of a distinction recognized by this Court can be pointed out by litigants and commentators, and corrected through the refinement of decisions in the lower courts—a process that is already under way. Such isolated mistakes do not warrant this Court's intervention.

II. This case is not a clean vehicle for addressing the question presented.

Petitioner describes this case as "a perfect vehicle for addressing the question presented." Pet. 20. Not so. In fact, it is not certain that a ruling for Petitioner here would lead to relief on remand, because the SJC did not clearly indicate that it found his counsel deficient under the federal standard, as opposed to a more protective state standard. Even if this Court were to adopt Petitioner's proposed rule, the SJC might be disinclined to grant relief without first finding counsel deficient under federal law. Such a finding is not guaranteed. Indeed, the SJC has declined to find defense attorneys deficient in multiple, similar situations.

To be sure, the SJC in Petitioner's case agreed that defense counsel erred. Pet. App. 30a-31a, 40a. But the court did not reference federal ineffectiveness law. *Id.* And, although the court was also not entirely clear about which of two state standards it applied, in either case, it was one that was more generous to Petitioner.

In discussing Petitioner's coerced-admission ineffectiveness claim earlier in its opinion, the SJC cited the Massachusetts standard applicable in direct

appeals of first-degree-murder convictions, stating that, "[w]here a defendant has been convicted of murder in the first degree, the court evaluates a claim of ineffective assistance [] to determine whether 'there exists a substantial likelihood of a miscarriage of justice[.]'" Pet. App. 30a (quoting *Commonwealth v. Williams*, 453 Mass. 203, 204, 900 N.E.2d 871, 874 (2009)). But, in addressing defense counsel's failure to object to the courtroom closure, the SJC repeated language from the general state constitutional ineffectiveness standard that it applies in other cases. The court indicated that the "motion judge's analysis . . . correctly determined that counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable[.]'" Pet. App. 40a. *See, e.g.*, *Breese v. Commonwealth*, 415 Mass. 249, 252, 612 N.E.2d 1170, 1172 (1993) (recognizing "serious incompetency, inefficiency, or inattention" standard as state constitutional test).

If the SJC utilized Massachusetts's special standard for first-degree-murder cases, then it applied one that, as it explained, "is more favorable than the constitutional standard for determining ineffectiveness of counsel." Pet. App. 31. That is, it is "more favorable to a defendant than the Federal or State constitutional standards." *Commonwealth v. Mosher*, 455 Mass. 811, 827, 920 N.E.2d 285, 299 (2010); *accord Knight v. Spencer*, 447 F.3d 6, 10-11, 15 (1st Cir. 2006). Indeed, "[t]he court considers the defendant's claim 'even if the action by trial counsel does not constitute conduct 'falling measurably below that . . . of an ordinary fallible lawyer[.]'" Pet. App. 31a (quoting *Commonwealth v. Gonzalez*, 443 Mass.

799, 808-09, 824 N.E.2d 843, 852 (2005), which was comparing special standard to usual standard).

But, even if the SJC applied the usual state standard for cases other than first-degree-murder direct appeals, Petitioner still benefited from a test more protective than *Strickland*. With respect to effectiveness of counsel, Massachusetts "grant[s] more expansive protections under [its own constitution] than have been required of States under the Sixth Amendment.'" *Commonwealth v. Marinho*, 464 Mass. 115, 124, 981 N.E.2d 648, 657 (2013) (citations omitted) (quoting *Commonwealth v. Rainwater*, 425 Mass. 540, 553, 681 N.E.2d 1218, 1227 (1997); and observing that "[s]atisfying [the usual state standard] necessarily satisfies the Federal standard articulated in [*Strickland*] for evaluating the constitutional effectiveness of counsel"); *see also Commonwealth v. Lykus*, 406 Mass. 135, 138-39, 546 N.E.2d 159, 162 (1989) ("[T]he right to effective assistance of counsel, afforded a defendant by [the state constitution], 'provide[s] greater safeguards than the Bill of Rights of the United States Constitution.'" (second alteration in original) (quoting *Commonwealth v. Hodge*, 386 Mass. 165, 169, 434 N.E.2d 1246, 1249 (1982)); *Commonwealth v. Pena*, 31 Mass. App. Ct. 201, 202, 575 N.E.2d 774, 775 (1991) (reciting above statement from *Hodge*). The court has also historically "emphasize[d] that [it] will be the arbiter of the [state] standard . . . and will not be bound by Federal precedent when deciding that issue." *Commonwealth v. Urena*, 417 Mass. 692, 695-696, 632 N.E.2d 1200, 1202-03 (1994); *accord*

Commonwealth v. Corcoran, 69 Mass. App. Ct. 123, 129 n.12, 866 N.E.2d 948, 954 n.12 (2007).[14]

Moreover, despite the SJC's conclusions about defense counsel's conduct under state law, there would be reason for it to find that Petitioner has not shown deficient performance in the *Strickland* sense. As the court noted, the judge who heard the coerced-admission ineffectiveness claim found that defense counsel was "very experienced and highly regarded," having "handled over one hundred murder trials at the trial and appellate level." Pet. App. 27a-28. And the motion judge who addressed the courtroom-closure ineffectiveness claim thoroughly discussed the severe crowding during jury selection. Pet. App. 38a-39a, 43a-54a. The record also reflects certain concerns about interaction between prospective jurors and interested individuals in the courthouse, and defense counsel's sensitivity to the issue. Pet. App. 45a-46a.

Indeed, in several other cases, the SJC has found experienced attorneys who failed to object to a courtroom closure not to have performed deficiently, even though they were unaware that the public-trial

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[14] It is true that "[the First Circuit has] described the [usual state standard] as 'functionally identical to the *Strickland* standard.'" *Mello v. DiPaulo*, 295 F.3d 137, 144-45 & nn.6,7 (1st Cir. 2002) (quoting *Scarpa v. DuBois*, 38 F.3d 1, 7 n.4 (1st Cir. 1994)). But, of course, that court's pronouncement of state law is not determinative, especially where the state's highest court has taken a different view. *See, e.g.*, *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law' . . . [and] the prerogative of the [state's] Supreme Court to say what [state] law is merits respect in federal forums." (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975))).

right extended to jury selection. *See, e.g.*, *Commonwealth v. Celester*, 473 Mass. 553, 578 & nn.33,34, 45 N.E.3d 539, 559-60 & nn.33,34 (2016) (rejecting defendant's argument "that trial counsel and counsel handling his first motion for a new trial provided ineffective assistance because they were unaware that exclusion of the public from jury selection violated the defendant's Sixth Amendment right" (citing *Commonwealth v. Morganti*, 467 Mass. 96, 97-98, 103-05, 4 N.E.3d 241 (2014), and *Commonwealth v. Alebord*, 467 Mass. 106, 114, 4 N.E.3d 248 (2014), in which experienced counsel who were unaware that public-trial right applied to jury selection and did not object to closure were found not deficient)); *Commonwealth v. Fritz*, 472 Mass. 341, 346-47, 34 N.E.3d 705, 710 (2015) (similar).

Thus, there is no guarantee that the SJC would find Petitioner's counsel to have performed deficiently under the more demanding federal ineffectiveness standard and grant relief under a presumptive-prejudice rule on remand. Petitioner is thus mistaken in describing this case as a suitable vehicle for addressing the issue presented.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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RECORD AND BRIEF

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In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent candidly acknowledges the "division" and "disagreement" among the lower courts (Opp. 9) over the question whether prejudice must be presumed when ineffective assistance of counsel results in a structural error. Respondent does not disagree that the question presented in the petition is exceptionally important. And respondent does not dispute *amici*'s demonstration that resolution of the question presented would shed much-needed light on the question of how federal and state courts should approach unpreserved structural errors in a wide range of other procedural contexts.

Respondent instead resists certiorari on two grounds. *First*, it says (Opp. 9-22) that the conflict is not as deep as the petition makes it out to be and suggests (Opp. 15) that the conflict therefore "can be left to the lower courts to correct." *Second*, respondent asserts (Opp. 25) that the Massachusetts courts might yet "find that Petitioner has not shown deficient performance in the *Strickland* sense."

Neither assertion has any merit. The petition for a writ of certiorari should be granted.

A. Only this Court can restore uniformity on the question presented

We showed in the petition (at 10-18) that the lower courts are deeply divided on the question whether prejudice should be presumed when ineffective assistance results in a structural error. Respondent acknowledges the "disagreement in the lower courts" (Opp. 9) but insists that "the division is not so pronounced" as we demonstrated in the petition (*ibid.*) and that the conflict can be "corrected through the refinement of decisions in the lower courts" (Opp. 22).

Respondent is wrong. The question presented implicates a mature and acknowledged split that has persisted for well more than a decade despite repeated opportunities for the courts to consider the reasoning of their peers. Only this Court can resolve the intractable disagreement among the lower courts.

1. Respondent does not disagree that both *Owens* v. *United States*, 483 F.3d 48 (1st Cir. 2007), and *Littlejohn* v. *United States*, 73 A.3d 1034 (D.C. 2013), squarely conflict with the decision below on the question presented. See Opp. 17. Nor could it. In each of those cases, the court held that a defendant who had demonstrated deficient performance was not required to establish actual prejudice under *Strickland* because the consequence of the deficiency was a structural error. See *Owens*, 483 F.3d at 64-65 & n.13; *Littlejohn*, 73 A.3d at 1043-1044.

Respondent describes both cases as "isolated" and asserts that "these courts can correct themselves." Opp. 17. That is mistaken. The court in *Littlejohn* recognized the split, considered the reasoning of the courts on the opposite side of the issue, and disagreed with those courts nonetheless. See 73 A.3d at 1043 ("we do not agree with the Eleventh Circuit"). There is no reason to think the District of Columbia Court of Appeals would change its mind now.

As for *Owens*, that case has been cited over 340 times in courts throughout the country, including over 200 times in the district courts within the First Circuit and over 20 times by the First Circuit itself. In all that time, the First Circuit has not once signaled any reluctance to adhere to its holding. There is, in short, no reason to think that the First Circuit would reverse course, either.

2. Respondent does not deny that the Eighth Circuit's decision in *McGurk* v. *Stenberg*, 163 F.3d 470 (8th Cir. 1998), also conflicts with the decision below. It asserts, instead, that *McGurk* was wrongly decided and that the Eighth Circuit has "begun to rectify its own mistake" by "narrowly confin[ing] *McGurk*." Opp. 15. Not so.

Quite apart from "narrowly confin[ing]" *McGurk*'s holding (Opp. 15), the Eighth Circuit's decision in *Addai* v. *Schmalenberger*, 776 F.3d 528 (8th Cir. 2015), expressly confirmed that *McGurk* remains binding circuit law: "under this court's precedent, 'when counsel's deficient performance causes a structural error, we will presume prejudice under *Strickland*.'" *Id.* at 535 (quoting *McGurk*, 163 F.3d at 475). The Eighth Circuit denied relief in *Addai* only because the petitioner in that case (a state-court defendant proceeding under 28 U.S.C. § 2254) had "failed to demonstrate clearly established federal law" precisely *because* the lower courts "have taken somewhat varying approaches" to the question that we presented in the petition here. *Ibid.* We made this point in the petition (at 14 n.3), but respondent ignores it.[1]

Respondent says (Opp. 16) that *Addai* described other cases as "in tension" with *McGurk*. It did nothing of the sort. In fact, *Addai* approvingly cited *Miller* v. *Dormire*, 310 F.3d 600 (8th Cir. 2002), in which the Eighth Circuit affirmed the district court's grant of habeas corpus relief in light of *McGurk*: "this circuit has determined that * * * *Strickland* prejudice is presumed" when ineffective assistance of counsel "is

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[1] While the court in *Addai* admonished that *the petitioner* in that case "may be reading *McGurk* too broadly" (776 F.3d at 535), it did not call the correctness of *McGurk*'s holding into question.

tantamount to a structural error." *Id.* at 603 (citing *McGurk*). There is thus little reason to think that the Eighth Circuit is backing away from *McGurk*.[2]

3. Respondent contends the that remaining three cases that we cited in the petition are not in conflict at all with the Supreme Judicial Court's decision in this case. See Opp. 17-22. Even if that were correct, it would not overcome respondent's concession that the lower courts are divided. Thus, further review is warranted no matter the state of the law in these other jurisdictions. But even on its own terms, respondent's attempt to diminish the conflict is unpersuasive.[3]

Take first the Seventh Circuit's decision in *Winston* v. *Boatwright*, 649 F.3d 618 (7th Cir. 2011). Respondent says that *Winston* is distinguishable be-

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[2] The decisions in *Charboneau* v. *United States*, 702 F.3d 1132 (8th Cir. 2013), and *United States* v. *Kehoe*, 712 F.3d 1251 (8th Cir. 2013), do not suggest otherwise. *Charboneau* involved a claim challenging the assistance of appellate counsel whose deficient performance did not, according to the court, result directly in a structural error. 702 F.3d at 1138. And *Kehoe*, which relied on pre-*McGurk* precedents, was limited by it terms to *Batson* errors. 712 F.3d at 1253. Although we submit that *Kehoe* was wrongly decided, its holding does not call into question the *McGurk* or its continuing applicability to non-*Batson* cases like this one.

[3] We have since uncovered an additional case from the Fourth Circuit resolving the question presented in petitioner's favor. See *Bell* v. *Jarvis*, 236 F.3d 149, 165 (4th Cir. 2000) (en banc) (citing *McGurk* favorably for the proposition that "the prejudice component of the *Strickland* analysis may be presumed if the nature of the deficient performance is that of a structural error"). Indeed, even the dissenting judges in *Bell* expressed their view that "the majority properly recognizes [that when] deficient performance constitutes structural error 'the prejudice component of the *Strickland* analysis may be presumed'"). *Id.* at 180 (Motz., J., dissenting).

cause it involved a *Batson* error and is "best read as recognizing a new category of cases in which prejudice is so likely that it can be presumed under *Strickland* and *Cronic*." Opp. 20.

That ignores what the court said. In analyzing the question presented, the Seventh Circuit catalogued a range of structural errors (including denial of counsel, provision of conflicted counsel, and denial of counsel of choice) and held in plain terms that "[u]nconstitutional juror strikes, *like other structural errors*, create the kind of problem that '*def[ies] analysis by harmless error standards.*'" 649 F.3d at 633 (emphasis added) (quoting *Neder* v. *United States*, 527 U.S. 1, 7 (1999)). It was for that reason—the impossibility of evaluating harmlessness—that the Seventh Circuit held that prejudice must be presumed when ineffective assistance results in a structural error, regardless of the precise nature of the error. There is thus every reason to believe that petitioner would have received a new trial if his claim had arisen in the Seventh Circuit.[4]

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[4] Respondent claims—puzzlingly—that it "has uncovered no decision" citing *Winston* for its resolution of the question presented. Opp. 20-21. But in *LaChance*, the Supreme Judicial Court itself cited *Winston* for the proposition that prejudice is "presumed * * * on a claim of ineffective assistance of counsel predicated on counsel's failure to raise structural error at trial." *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1111 n.9 (Mass. 2014). There are many other such cases, including some cited by respondent elsewhere in its opposition. See, *e.g.*, *United States* v. *Kehoe*, 712 F.3d 1251, 1255 n.4 (8th Cir. 2013) (citing *Winston* for the proposition that "prejudice is presumed for purposes of *Strickland*" when deficient performance results in structural error). See also, *e.g.*, *State* v. *Sessions*, 342 P.3d 738, 746 (Utah 2014) (citing *Winston* as "chief among" the decisions standing for the "presumed prejudice" rule); *State* v. *Cabrera*, 2015 WL 3878287, at *19 (Del. Super. Ct. 2015) (similar).

Concerning the Montana Supreme Court's decision in *State* v. *Lamere*, 112 P.3d 1005 (Mont. 2005), respondent says that the court there was concerned only with state law, and not federal law. Opp. 21. That once again ignores what the court said. With respect to its holding that "constructive denial of the assistance of counsel is presumed to result in prejudice," *Lamere* (like *LaChance*) was unmistakably construing "the second prong of the *Strickland* test" under the federal "Sixth Amendment." 112 P.3d at 1012, 1013. To say otherwise simply denies reality.

Finally, respondent says that the Sixth Circuit's decision in *Johnson* v. *Sherry*, 586 F.3d 439 (6th Cir. 2009), did not establish a categorical rule because the court said only that there was a "strong likelihood" that prejudice would be presumed on remand in that case. Opp. 18-19. But the better reading of that statement is that the court meant that it was likely (but not certain) that the petitioner would prevail on the *first* prong of the *Strickland* inquiry, thus triggering the presumption of prejudice under the second prong. That is evidently how Judge Kethledge read the majority opinion when he stated in his dissent that "[o]ur decision today directly conflicts with [the Eleventh Circuit's] decision [in *Purvis*]." 586 F.3d at 449.[5]

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[5] Pointing to *Ambrose* v. *Booker*, 684 F.3d 638, 651 (6th Cir. 2012), respondent asserts (Opp. 18) that the Sixth Circuit has "confirmed" the "limited reach" of *Johnson*. Although certain aspects of *Ambrose* are in tension with the reasoning in *Johnson*, the two cases are distinguishable: Whereas *Johnson* is an ineffective assistance case, *Ambrose* is a procedural default case. See *Ambrose*, 684 F.3d at 651. As the amici supporting the petition aptly explain (Amici Br. 10-11), the lower courts are separately conflicted on the question whether to presume prejudice in procedural default cases like *Ambrose*. Review of the question presented here would likely help clear up that confusion.

In sum, there is no denying that the lower courts are deeply divided over the question presented; respondent's suggestion that the conflict might resolve itself simply doesn't hold up. Further review is therefore warranted.

B. The question is cleanly presented

1. We demonstrated in the petition (at 20-23) that this case is an impeccable vehicle for addressing the question presented. The trial court concluded that petitioner's Sixth Amendment right to a pubic trial was violated, resulting in a structural error. Pet. App. 55a-60a. It held further that counsel's failure to object to the courtroom closure "was not the product of tactical consideration" but instead was "the product of 'serious incompetency, inefficiency, or inattention' to [petitioner]'s Sixth Amendment right to a public trial, and was not objectively reasonable." Pet. App. 62a-63a. It still denied relief, but only because petitioner "has not offered any evidence or legal argument establishing prejudice." *Id.* at 64a.

After explaining that "[a] violation of the Sixth Amendment right to a pubic trial constitutes structural error," the Supreme Judicial Court held that the trial court had "correctly determined that counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to [petitioner]'s Sixth Amendment right to a public trial, and was not objectively reasonable.'" Pet. App. 39a-40a (emphasis omitted). It thus affirmed the trial court's denial of relief based exclusively upon "the rule announced in *LaChance*" because petitioner had "failed to show that trial counsel's conduct caused prejudice." *Ibid.*

Beyond all of that, petitioner has consistently litigated his ineffective assistance claim as a matter of

federal law. See Petr. SJC Br. 39-47 (arguing that petitioner was "deprived of his federal * * * right to * * * effective assistance of counsel" and that *LaChance* should not make him "ineligible for federal relief"). And the lower court resolved the question presented in the petition by applying *LaChance*, which was unmistakably a *Strickland* case. Pet. App. 40a.

2. Respondent nevertheless asserts that this case may not be a suitable vehicle because the Supreme Judicial Court "*seems* to have applied" the state standard to the performance prong of the ineffective assistance inquiry (Opp. 9 (emphasis added)) and "did not *clearly* indicate that it found [petitioner's] counsel deficient under the federal standard" (Opp. 22 (emphasis added)). It thus speculates that there "is no guarantee that the [court below] would find [p]etitioner's counsel to have performed deficiently under the more demanding federal ineffectiveness standard" on remand. Opp. 26.

Respondent's speculation does not diminish the suitability of this case for further review, for three reasons.

First, the lower courts' deficient-performance analysis followed the *Strickland* test precisely. To establish deficient performance under *Strickland*, a defendant must show that his lawyer's conduct was not "the result of reasonable professional judgment" and fell "outside the wide range of professionally competent assistance." *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984). That is just what the trial court held and what the court below affirmed: Petitioner's lawyer's failure to object to the closure "was not the product of tactical consideration" and thus fell short of "objectively reasonable" professional judgment. Pet. App. 40a, 62a-63a. There is, therefore, no reason to think

that the lower court meant to leave open the question whether petitioner's trial counsel was constitutionally deficient "in the *Strickland* sense" (Opp. 25).

Second, to the extent Massachusetts law of ineffective assistance is in some respects "more favorable" to defendants (Opp. 23), it is for reasons unrelated to the performance prong of the test. For example, the Massachusetts courts recognize a right to counsel in broader circumstances than does this Court. See, *e.g.*, *Commonwealth* v. *Rainwater*, 681 N.E.2d 1218, 1227 (Mass. 1997), abrogated on unrelated grounds by *Texas* v. *Cobb*, 532 U.S. 162 (2001). Thus there is no reason to think that the SJC would evaluate attorney performance, in particular, differently under state and federal standards in any event.[6]

Finally, even if we were wrong about the first two points, respondent's speculation still would not provide a basis for denying review. When subsequent issues remain unaddressed., the ordinary course is for the Court to resolve the question presented in the petition and, if petitioner prevails, to remand for "full consideration by the courts below" of the remaining issues. *Cooper Indus.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004. If (contrary to fact) the federal performance question really had gone unaddressed, that would be the proper outcome here.

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[6] Regardless, there is no merit to respondent's suggestion that trial counsel was not deficient. Opp. 25-26. On this point, respondent does not dispute any of the lower courts' factual findings; rather, it cites *other* cases in which the courts found adequate performance. But those are different cases with different lawyers facing different facts. They have no bearing here.

C. The decision below is wrong

In addressing the circuit split, respondent argues that the cases that have adopted the no-presumption rule are "in harmony" with this Court's precedents. Opp. 10. It does so unpersuasively.

Respondent contends, in the main, that proof of prejudice under *Strickland* is indispensable because prejudice is an element of the constitutional violation itself; without an independent demonstration of prejudice, it reasons, deficient performance does not mature into a constitutional violation at all. See Opp. 11-12 (citing, *e.g.*, *Premo* v. *Moore*, 562 U.S. 115, 128 (2011) ("The *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one.")).

That argument, and the cases respondent cites to support it, do not speak to the circumstances implicated by the question presented in the petition. In cases like this one, it is the separate and distinct constitutional violation *resulting from* the deficient performance that "necessarily render[s] [the] criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 158 (2006) (emphasis omitted). The question here is whether the presumptive prejudice flowing from that distinct structural violation should be understood as *also* satisfying the second prong of the *Strickland* test. The cases cited by respondent at pages 11 through 12 of the opposition do not address that question.

CONCLUSION

For the foregoing reasons and those stated in the petition, the Court should grant certiorari.

Respectfully submitted.

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RECORD AND BRIEFS

No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS

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INTEREST OF AMICI CURIAE*

Since its founding in 1976, Criminal Defense Attorneys of Michigan (CDAM) has been the statewide as-

* No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. Amici timely notified all parties of their intention to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk.

sociation of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members. As reflected in its bylaws, CDAM exists to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws." Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles relating to criminal law and procedure, and provides information to the state legislature regarding contemplated legislation. CDAM is often invited to file amicus curiae briefs by the Michigan appellate courts.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The Georgia Association of Criminal Defense Lawyers (GACDL), a frequent amicus curiae in state and federal courts, is a not-for-profit association composed of many members of Georgia's criminal defense bar. Its approximately 1500 members include both public defenders and private counsel. Among other goals, GACDL is dedicated to improving the fair administration of criminal justice and to securing and preserving defendants' constitutional rights in criminal prosecutions. This dedication is particularly important in cases that address issues of ineffective assistance of counsel and defendants' right to a public trial.

The Washington Association of Criminal Defense Lawyers (WACDL) is an association of attorneys practicing criminal defense law in Washington. WACDL was formed in 1987 to improve the quality and administration of justice. The objectives and purposes of WACDL are to protect and ensure by rule of law those individual rights guaranteed by the United States and Washington Constitutions, and to resist all efforts made to curtail such rights; to improve the professional status of all lawyers and to encourage cooperation between lawyers engaged in the furtherance of its objectives through publications, education, and mutual assistance; and to engage in all activities on a local, state, and national level that will advance the purposes for which the organization is formed in order to promote justice and the common good of the citizens of the United States. One of the ways WACDL carries out these objectives is filing amicus briefs in cases that affect the fundamental constitutional rights of the defendant. WACDL has been active in protecting a de-

fendant's constitutional right to a public trial and has filed amicus briefs in other cases addressing this issue.

The Wisconsin Association of Criminal Defense Lawyers (WACDL) is an organization composed of criminal defense attorneys practicing in the State of Wisconsin, with a membership of both private and public defender attorneys totaling more than 400 attorneys, and whose members appear regularly before all Wisconsin state and federal courts. WACDL, by its charter, is organized to foster and maintain the integrity of the criminal defense bar, to promote the proper administration of criminal justice, and to uphold the protection of individual rights and due process of law. WACDL and its members, consequently, have an abiding professional and ethical commitment to ensure that criminal defendants receive the due process of law to which they are entitled.

As petitioner explains (Pet. 8-9), the Supreme Judicial Court of Massachusetts acknowledged that a violation of a defendant's Sixth Amendment right to a public trial is a structural error, but declined to apply a presumption of prejudice when presented with a claim of ineffective assistance of counsel. Pet. App. 40a. The decision below contributes to a deep division among the lower federal courts and state courts that leads to inequitable outcomes for similarly situated defendants.

Because of their commitment to protecting the constitutional rights of the citizens of Michigan, Arizona, Georgia, Washington, and Wisconsin, amici have a substantial interest in the issues presented in this case.

SUMMARY OF ARGUMENT

This Court has explained that structural errors undermine the fairness of a criminal trial, that it is impossible to assess the ensuing harm, and that the presence of a structural error requires automatic reversal of a conviction. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148-151 (2006). Inherent tension exists between this presumption of prejudice for structural errors and the analytical framework used to determine whether defense counsel was constitutionally ineffective under *Strickland* v. *Washington*, 466 U.S. 668 (1984), which requires a defendant to show prejudice. Courts frequently struggle to reconcile these two doctrines when defense counsel unreasonably fails to object to a structural error or causes one.

As petitioner has correctly explained (Pet. 18-20), the decision of the Supreme Judicial Court of Massachusetts is erroneous. It also contributes to a well-developed split among the lower federal courts and state courts (Pet. 10-17) on whether prejudice can be presumed when a claim for ineffective assistance of counsel involves a structural error, such as a violation of a defendant's right to public trial. This conflict is unlikely to be resolved through additional percolation.

Amici write separately to emphasize that this Court's guidance on the precise question presented—whether it is necessary to demonstrate prejudice from structural errors in the *Strickland* context—would also clarify how the lower federal courts and state courts should approach unpreserved structural errors in other procedural contexts currently mired in deep confusion and discord.

These contexts include federal and state postconviction review of procedurally defaulted structural claims, belated claims of structural error under Federal Rule of Criminal Procedure 12, and unpreserved structural errors subject to plain-error review on direct appeal. Defendants must prove prejudice in each context. But because of deep confusion among the lower federal courts and state courts, some defendants enjoy a presumption of prejudice, while others are forced to assess the impact of errors that are exceptionally difficult—if not impossible—to quantify.

The disparate approaches to analyzing unpreserved claims of structural error lead to widespread inequity. This Court's intervention is needed now.

ARGUMENT

A. Clarifying whether prejudice from structural error is presumed under *Strickland* will guide evaluation of unpreserved structural error claims in other procedural contexts

Lower federal courts and state courts recognize the differences between trial errors and structural errors. They similarly agree in their treatment of preserved structural error. Yet they are deeply divided in their approach to unpreserved structural errors, whether raised in an untimely pretrial motion, a claim of ineffective assistance of counsel, or a federal habeas proceeding in which the petitioner seeks to overcome procedural default. Each procedural context requires defendants to make a distinct showing, such as cause or deficient performance, ultimately to prevail on the merits. But each also involves a prejudice inquiry that forces courts to grapple with how to evaluate the

prejudice of structural error. Such prejudice inquiries should not differ substantially.

The similarity in the prejudice inquiry for each procedural context highlights the importance of the question presented and the need for greater clarity about how to approach a structural federal constitutional error that occurred but was not preserved in a criminal trial.

1. Structural errors are fundamentally different from trial errors

This Court has defined two classes of error—trial error and structural error. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Trial errors arise during the presentation of evidence to the jury and are amenable to qualitative assessment "in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Ibid.* (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 307-308 (1991)). When a trial error occurs, courts must ignore the error unless it contributed to the guilty verdict. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). A defendant is entitled to a new trial only if a trial error is harmful.

Structural errors, in contrast, "affect[] the framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. An error is structural if it "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Neder* v. *United States*, 527 U.S. 1, 9 (1999) (emphasis omitted), if it "def[ies] analysis by harmless-error standards" and "affect[s] the entire adjudicatory framework," *Puckett* v. *United States*, 556 U.S. 129, 141 (2009) (citation and internal quotation marks omit-

ted), or if it is difficult—if not impossible—to assess, *ibid.* (citing *Gonzalez-Lopez*, 548 U.S. at 149 n.4). Examples of structural error recognized by this Court include an illegally constituted grand jury, see *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986), "the denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction," *Gonzalez-Lopez*, 548 U.S. at 149 (internal citations omitted).

When a structural error occurs at trial over the defendant's objection, the defendant is entitled to a new trial regardless of whether the error contributed to the verdict. In other words, even when the jury reached the "right" result, a new trial is necessary; prejudice is presumed whenever a structural error occurs. *Neder*, 527 U.S. at 34 (Scalia, J., dissenting) (citing *Rose* v. *Clark*, 478 U.S. 570, 578 (1986)).

2. Courts confront whether to presume prejudice for unpreserved claims of structural error in multiple procedural contexts

a. Federal courts apply a cause-and-prejudice standard in federal habeas proceedings when a petitioner has procedurally defaulted a constitutional claim. *Bousley* v. *United States*, 523 U.S. 614, 622 (1998) (citing *Murray* v. *Carrier*, 477 U.S. 478, 485 (1986); *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977)). Habeas petitioners seeking relief in federal court must therefore prove prejudice before a district court may review their defaulted constitutional claims. See *ibid.* (requiring proof of cause and prejudice when a federal

prisoner filed a motion for relief under 28 U.S.C. 2255); see also *Sykes*, 433 U.S. at 87 (requiring proof of cause and prejudice for a state prisoner to obtain federal review under 28 U.S.C. 2254). Petitioners in state postconviction proceedings often are similarly required to prove cause and prejudice before defaulted claims may be considered. See, *e.g.*, *People* v. *Jackson*, 633 N.W.2d 825, 829-830 (Mich.) (requiring "good cause" and "actual prejudice" for postconviction relief under Mich. Ct. R. 6.508(D)), reh'g denied and opinion modified (Nov. 8, 2001); *Berryhill* v. *State*, 603 N.W.2d 243, 245 (Iowa 1999) (requiring "sufficient reason or cause" and "actual prejudice" for postconviction relief); *Turpin* v. *Todd*, 493 S.E.2d 900, 905 (Ga. 1997) (requiring "adequate cause" and "actual prejudice" for postconviction relief under Ga. Code § 9-14-48(d)).

b. The same cause-and-prejudice standard applies in the context of Federal Rule of Criminal Procedure 12, which requires parties to file pretrial motions addressing certain defects, some of which may be structural errors. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 116-117 (2007) (Scalia, J., dissenting) (contending that defects in an indictment are structural errors even though the majority declined to address the question); *United States* v. *Du Bo*, 186 F.3d 1177, 1179-1180 (9th Cir. 1999) (holding that the failure to allege an element or critical facts in an indictment requires automatic reversal of a conviction). Defendants who fail to file such motions before the deadline must establish "good cause" before a district court may consider a late motion. Fed. R. Crim. P. 12(c)(3). The good-cause standard requires the tardy movant to show cause and prejudice. See *Davis* v. *United States*,

411 U.S. 233, 243-245 (1973); *United States* v. *Edmond*, 815 F.3d 1032, 1044 (6th Cir. 2016).

c. The prejudice analysis required to obtain review of a procedurally defaulted claim or an untimely Rule 12 motion is similar, if not identical, to the prejudice inquiry for demonstrating ineffective assistance of counsel. A lawyer's errors amount to violations of a defendant's Sixth Amendment right to counsel only when the lawyer's acts or omissions are not "the result of reasonable professional judgment," and such professionally unreasonable conduct affected the judgment. *Strickland* v. *Washington*, 466 U.S. 668, 690-691 (1984). Thus, if a court concludes that counsel's performance was professionally unreasonable, it must evaluate whether the error was prejudicial. That analysis mandates consideration of whether it is possible to evaluate the harm of a structural error caused or overlooked by counsel.

d. In each of these three contexts—procedural default in habeas proceedings, untimely pretrial motions, and claims of ineffective assistance of counsel—courts confront whether they can quantify the supposedly unquantifiable structural error. As petitioner explains (Pet. 10-17), there is a clear and deep split of authority about whether prejudice may be presumed when counsel's unprofessional conduct causes or defaults a structural error.

Federal courts of appeals are equally divided on whether prejudice may be presumed when a structural error has been procedurally defaulted. The Fifth, Sixth, and Eleventh Circuits require habeas petitioners to prove that procedurally defaulted structural error impacted the outcome of the trial. See *Ambrose* v.

Booker, 684 F.3d 638, 652 (6th Cir. 2012) (remanding procedurally defaulted claims of a fair cross-section violation to the district court to determine "what would have happened" had the venire been properly constituted); *Hollis* v. *Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) (requiring petitioner, who was tried, convicted, and sentenced to death by a jury drawn from a racially discriminatory pool, to establish "actual prejudice" to overcome the procedural default of his claim); *Huffman* v. *Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981) (remanding for the district court to evaluate whether an improperly drawn venire impacted the outcome of the trial).

In contrast, the First and Ninth Circuits presume prejudice when the defaulted error is structural. *United States* v. *Withers*, 638 F.3d 1055, 1065-1066 (9th Cir. 2010) (presuming prejudice for procedurally defaulted claim of improper courtroom closure); *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007) (holding that actual prejudice requirement does not apply to defaulted structural errors).

* * *

Resolution of the question presented will provide guidance to courts struggling with whether to presume prejudice in all of these procedural contexts.

3. Prejudice is also implicated by plain-error review of unpreserved claims of structural error

Resolving the question presented may also help reconcile a long-acknowledged dispute concerning plain-error review when the forfeited error is structural. A defendant forfeits a claim of error by failing to

timely assert it, and the forfeited claim is subject to plain-error review on appeal. *United States* v. *Olano*, 507 U.S. 725, 733 (1993).

To obtain relief under plain-error review, the claimed error must actually be an error, meaning "some sort of [d]eviation from a legal rule." *Puckett*, 556 U.S. at 135 (citation and internal quotation marks omitted). "Second, the legal error must be clear or obvious, rather than subject to reasonable dispute." *Ibid.* Third, the error must affect the defendant's "substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings." *Ibid.* (citation and internal quotation marks omitted). Only after those three criteria have been satisfied may appellate courts exercise their "discretion to remedy the error"—discretion limited to those circumstances where the "error seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Ibid.* (citation and internal quotation marks omitted; emphasis omitted).

The third step of plain-error review thus resembles the prejudice inquiries involved when evaluating whether to review procedurally defaulted claims or whether counsel was constitutionally ineffective. Courts inevitably engage in a prejudice inquiry when applying plain-error review and therefore must confront whether to presume prejudice for plain structural errors.

The majority of federal courts of appeals presume prejudice when a defendant asserts a plain structural error for the first time on appeal. See, *e.g.*, *United States* v. *Negron-Sostre*, 790 F.3d 295, 305-306 (1st Cir. 2015) (presuming the prejudice of a structural error

satisfies the third and fourth prongs of plain-error review); *United States* v. *Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015) (noting that evaluation of the third prong of plain-error review differs "where there has been a finding of structural error"); *United States* v. *Ramirez-Castillo*, 748 F.3d 205, 215-216 (4th Cir. 2014) (presuming a structural error affected the defendant's substantial rights); *United States* v. *Turner*, 651 F.3d 743, 748 (7th Cir. 2011) (noting that when a structural error occurs, "[i]t is not a long step to argue that prejudice also should be presumed (or need not be shown independently) under the plain error standard"); *United States* v. *Barnett*, 398 F.3d 516, 526-529 (6th Cir. 2005) (presuming the prejudice of a structural error satisfies the third and fourth prongs of plain-error review); *United States* v. *Syme*, 276 F.3d 131, 154-155 (3d Cir. 2002) (applying a rebuttable presumption of prejudice after concluding the error was structural).

In contrast, many state courts do not presume prejudice on plain-error review of structural errors. See, *e.g.*, *People* v. *Vaughn*, 821 N.W.2d 288, 304 (Mich. 2012) (concluding that although wrongful courtroom closure is structural error, defendants must still prove it seriously affected the integrity, fairness, or public reputation of the proceedings); *Barrows* v. *United States*, 15 A.3d 673, 680 (D.C. 2011) (concluding that structural error of courtroom closure during voir dire did not seriously affect the fairness, integrity, or public reputation of the proceedings). But see *State* v. *Valverde*, 208 P.3d 233, 236 (Ariz. 2009) ("If an appellate court finds structural error, reversal is mandated regardless of whether an objection is made below or prejudice is found.").

This Court has acknowledged that the prejudice inquiry for structural errors on plain-error review remains unresolved. *Puckett*, 556 U.S. at 140-141 (recognizing dispute but not deciding whether structural errors automatically impact a defendant's substantial rights under the third prong of the plain-error test).

* * *

The lower federal courts and state courts need guidance explaining how to approach the prejudice inquiry when a structural error is unpreserved. They confront this issue in multiple procedural contexts, each of which imposes its own standard for actually obtaining relief. But the unique nature of structural errors, which by definition are not amenable to harmless error review, suggests that the prejudice component of those standards should not vary by context. The petition provides an ideal opportunity to reconcile the structural-error doctrine with a prejudice requirement.

B. Disparate approaches to presuming prejudice for unpreserved claims of structural error lead to inequitable results

As petitioner observes (Pet. 17-18), in the context of ineffective assistance of counsel, several federal courts of appeals and state high courts within those circuits take incongruous approaches to unpreserved claims of structural error. As a result, a defendant in federal court receives a new trial while a defendant in state court has no remedy, even though the failure to preserve the structural error is the same in both jurisdictions. This dissonance between state and federal jurisprudence is amplified when considering unpre-

served structural errors in other procedural contexts. A defendant's ability to vindicate important constitutional rights should not depend on whether he or she is charged by the state or federal government—which often share concurrent jurisdiction to prosecute the same conduct. See Robert Heller, *Selective Prosecution and the Federalization of Criminal Law*, 145 U. Pa. L. Rev. 1309, 1312 (1997).

A decision from this Court regarding how to assess prejudice from structural error in the *Strickland* context would provide an analytical framework for the lower federal and state courts to use when confronting unpreserved structural errors in other procedural postures, thereby helping to remedy inconsistent and inequitable outcomes.

1. Inequitable outcomes result from inconsistent approaches to the prejudice inquiry

In many instances of unpreserved structural error, defendants receive different constitutional protections depending on whether their trial occurs in state or federal court. A comparison of the inconsistency between Michigan and the Sixth Circuit, Wisconsin and the Seventh Circuit, and Massachusetts and the First Circuit demonstrates this inequity.

a. In certain procedural contexts, federal courts in Michigan grant a new trial to defendants raising unpreserved claims of structural error, but state courts provide no remedy. For example, the Sixth Circuit presumes prejudice for purposes of *Strickland* and procedurally defaulted habeas claims when the alleged error is structural. *Johnson* v. *Sherry*, 586 F.3d 439, 447 & n.7 (6th Cir. 2009) (right to public trial). Recog-

nizing that it is difficult if not impossible to measure the impact of structural errors on trial outcomes, the court held that prejudice should be presumed. *Id.* at 447 (citing *Gonzalez-Lopez*, 548 U.S. at 149 n.4). If a courtroom closure is not justified under *Waller* v. *Georgia*, 467 U.S. 39 (1984), defendants in the Sixth Circuit will receive a new trial without having to prove that the outcome of their trial would have been different.

Should defendants present a similar unpreserved public trial claim in Michigan state court, they must demonstrate actual prejudice to successfully pursue a claim for ineffective assistance of counsel. See *Vaughn*, 821 N.W.2d at 308. Even though an unjustified courtroom closure is a well-established structural error, which "def[ies] analysis by 'harmless-error' standards," *Fulminante*, 499 U.S. at 309, a defendant in Michigan state court must show that "the courtroom's closure during voir dire affected the voir dire process and tainted the ultimate jury chosen." *Vaughn*, 821 N.W.2d at 308. No such showing is required in federal court in the same location.

The conflict between the Michigan Supreme Court and the Sixth Circuit also spans direct appeals of unpreserved structural errors on plain-error review. The Sixth Circuit has held that defendants appealing an unpreserved structural error need not establish that the error affected their substantial rights or seriously affected the fairness of the proceedings, ordinarily the third and fourth prongs of plain-error analysis. See *United States* v. *Mahbub*, 818 F.3d 213, 224 (6th Cir. 2016) (racial discrimination in jury selection); *United States* v. *McAllister*, 693 F.3d 572, 582 n.5 (6th Cir.

2012) (same). Yet the Michigan Supreme Court requires defendants in the same circumstances to show that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People* v. *Cain*, 869 N.W.2d 829, 833-834 (Mich. 2015) (quoting *Vaughn*, 821 N.W.2d at 297). This requirement ignores the nature of structural errors, which "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Id.* at 848 (Viviano, J., dissenting) (quoting *Neder*, 527 U.S. at 8) (internal quotation marks omitted). As a result, a Michigan defendant's ability to obtain relief on direct appeal from a trial tainted by unpreserved structural error will often turn on whether he or she was charged in federal or state court.

b. The Seventh Circuit has concluded that intentional racial discrimination during jury selection is structural error requiring automatic reversal because it "persists throughout the proceeding and relates to the framework in which a trial proceeds." *Winston* v. *Boatwright*, 649 F.3d 618, 628 (7th Cir. 2011). In the context of a claim of ineffective assistance of counsel, the court explained that structural errors "inevitably 'undermine[ ] confidence in the outcome' of a proceeding." *Id.* at 632 (quoting *Strickland*, 466 U.S. at 694). For that reason, "[p]rejudice * * * is automatically present when the selection of a petit jury has been infected with a violation of *Batson* [v. *Kentucky*, 476 U.S. 79 (1986)] or *J.E.B.* [v. *Alabama*, 511 U.S. 127 (1994)]." *Ibid.*

In contrast, the Wisconsin Supreme Court has rejected a presumption of prejudice for structural errors. The court held in no uncertain terms that the

"categorization of the denial of the public trial right as structural error does not create a presumption of prejudice in ineffective assistance of counsel claims." *State* v. *Pinno*, 850 N.W.2d 207, 213 (Wis.), cert. denied, 135 S. Ct. 870 (2014). In so concluding, the court posited that a defendant's right to a public trial—the denial of which is an unquestioned structural error—was not as "structural" in nature as other structural defects: "[W]e have difficulty with a label—structural error—that equates the right to a completely open criminal trial with the right to an attorney or the right to an unbiased judge." *Id.* at 223. The court refused to presume prejudice for purposes of *Strickland* because "the denial of the right to a public trial does not always lead to unfairness or prejudice." *Id.* at 230. Because neither defendant could show actual prejudice, the court denied their claims for ineffective assistance of counsel. *Id.* at 231-232. Had the defendant in *Pinno* been prosecuted in federal court, he would have received a new trial.

c. The First Circuit presumes prejudice for claims that ineffective assistance of counsel resulted in the forfeiture of a public trial claim. *Owens*, 483 F.3d at 64. Structural errors implicate the fairness of "the entire trial process." *Ibid.* (quoting *Neder*, 527 U.S. at 8). The court emphasized the difficulty of weighing the prejudicial effect of a structural error, which carries "consequences that are necessarily unquantifiable and indeterminate." *Ibid.* (quoting *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993)). For that reason, the court held that a defendant need not show actual prejudice to excuse a procedurally defaulted claim or to demonstrate ineffective assistance: the court refused to "ask

defendants to do what the Supreme Court has said is impossible." *Id.* at 65.

The Massachusetts Supreme Judicial Court expressly departed from the reasoning in *Owens*, instead choosing to follow the Eleventh Circuit's insistence on showing actual prejudice to satisfy *Strickland*. See *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1104 (Mass. 2014), cert. denied, 136 S. Ct. 317 (2015); see also *Purvis* v. *Crosby*, 451 F.3d 734, 740-741 (11th Cir. 2006). The court believed it possible to "demonstrate prejudice in the context of a closed jury empanelment process." *LaChance*, 17 N.E.3d at 1106 n.3. Without any finding that defense counsel deliberately chose to forgo objection for strategic gain, the court also noted its desire to avoid providing the defendant with an "appellate parachute" for failing to preserve a structural right implicating the fairness of the trial. *Id.* at 1107. The court below relied on the recent decision in *LaChance* to deny petitioner's claims. Pet. App. 40a.

The First Circuit and the Massachusetts high court also disagree about what a Massachusetts defendant must show in a postconviction challenge to overcome prior procedural default. Defendants who fail to fully exhaust a claim of structural error in Massachusetts state court lose their ability to bring that claim in a state postconviction challenge. See *Mains* v. *Commonwealth*, 739 N.E.2d 1125, 1128-1129 (Mass. 2000). But federal defendants in Massachusetts who fail to take an appeal due to the dereliction of counsel obtain a new direct appeal through a postconviction motion for relief, even when they cannot show any meritorious issue exists for appellate consideration. See *Bonneau* v. *United States*, 961 F.2d 17, 23 (1st Cir. 1992).

The gulf between state and federal case law shows that citizens of Massachusetts receive different constitutional protections for structural errors. In federal court, a defendant will receive a new trial for an unjustified closure of the courtroom or a new appeal for unexhausted claims. But in state court, the rights protected by structural error analysis yield to a defendant's ability to show actual prejudice should counsel fail to raise the error in the first instance.

* * *

Such inequity is not mitigated by a state defendant's potential recourse to federal habeas review. A state defendant must exhaust state remedies before pursuing federal habeas, *Sykes*, 433 U.S. at 87, a process that can take ten years or more as in *Winston*, 649 F.3d at 624, before potentially receiving a new trial. Moreover, a defendant's claim in federal court must overcome the deference accorded to state court decisions under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which permits relief only when the state court's determination "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). This is exactly what occurred in *Winston*: the court determined that a *Batson* error occurred, that the error was structural, and that prejudice was "automatically present" because the trial was infected by structural error, yet the court still did not grant relief because the legal principle that "prejudice automatically flows from a deliberate *Batson* violation" had not been clearly established by this Court. 649 F.3d at 628-629, 632, 633-634.

Guidance from this Court regarding presumptive prejudice for unpreserved structural errors would have the additional benefit of establishing precedent on which lower federal courts can rely when considering claims subject to AEDPA deference, which require certainty from this Court.

2. There is widespread conflict and confusion regarding the presumption of prejudice for unpreserved claims of structural error

These disparities between state and federal courts sharing the same geographic location are not anomalous: there is widespread inequity in how lower federal courts and state courts analyze unpreserved claims of structural error. Courts are in tension over (1) when to apply a presumption of prejudice in cases involving unpreserved claims of structural error, and (2) which factors bear on whether to do so.

Many courts, including state high courts, presume prejudice for unpreserved structural errors in a variety of contexts, largely because the nature of structural error means that requiring proof of prejudice is tantamount to categorically denying relief. See, *e.g.*, *Yamashiro*, 788 F.3d at 1236 (presuming prejudice for

claim for denial of counsel during victim allocution subject to plain-error review).[1]

Other courts reach the opposite conclusion. See, *e.g.*, *United States* v. *Gomez*, 705 F.3d 68, 79-80 (2d Cir. 2013) (requiring showing of actual prejudice for claim for ineffective assistance of counsel under *Strickland* for denial of right to public trial).[2]

And whatever the outcome in these cases, they are frequently controversial and generate substantial disagreement among jurists.[3]

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[1] See also, *e.g.*, *Withers*, 638 F.3d at 1065-1066 (*Strickland*, public trial); *United States* v. *Noel*, 581 F.3d 490, 503 (7th Cir. 2009) (plain error, right to allocute); *Miller* v. *Dormire*, 310 F.3d 600, 603 (8th Cir. 2002) (*Strickland* and procedural default, right to jury trial); *Syme*, 276 F.3d at 154 (plain error, constructive amendment); *Littlejohn* v. *United States*, 73 A.3d 1034, 1043 (D.C. 2013) (*Strickland*, public trial); *State* v. *Wise*, 288 P.3d 1113, 1115 (Wash. 2012) (plain error, public trial); *Savoy* v. *State*, 22 A.3d 845, 859 (Md. 2011) (plain error, reasonable doubt instruction).

[2] See also, *e.g.*, *Purvis*, 451 F.3d at 743 (*Strickland*, public trial); *Vansickel* v. *White*, 166 F.3d 953 (9th Cir. 1999) (*Strickland* and procedural default, jury composition); *Stackhouse* v. *People*, __ P.3d __, 2015 WL 3946868, at *3 (Colo. June 29, 2015) (plain error, public trial), cert. denied, 136 S. Ct. 1513 (2016); *LaChance*, 17 N.E.3d at 1106-1107 (*Strickland* and procedural default, public trial); *People* v. *Allen*, 856 N.E.2d 349, 353-354 (Ill. 2006) (plain error, use of electronic stun belt without manifest need); *State* v. *Carprue*, 683 N.W.2d 31, 43 (Wis. 2004) (*Strickland*, judicial bias).

[3] See, *e.g.*, *Yamashiro*, 788 F.3d at 1238 (Bea, J., dissenting); *Withers*, 638 F.3d at 1071-1072 (Noonan, J., dissenting); *Noel*, 581 F.3d at 505 (Easterbrook, J., concurring); *Vansickel*, 166 F.3d at 960 (Reinhardt, J., dissenting); *Stackhouse*, 2015 WL 3946868, at *6 (Márquez, J., dissenting); *LaChance*, 17 N.E.3d at 1107-1110 (Duffy, J., dissenting); *Pinno*, 850 N.W.2d at 251-252 (Crooks, J., dissenting); *Littlejohn*, 73 A.3d at 1047 (Pryor, J., dissenting); *Wise*, 288 P.3d at 1124 (Madsen, C.J., dissenting); *Allen*, 856 N.E.2d at 361 (Freeman, J., dissenting).

Finally, without a guiding analytical framework for evaluating prejudice from unpreserved claims of structural error, some state courts have rested their decisions on unwarranted assumptions instead of sound legal analysis. For example, the Supreme Courts of Utah and Georgia have held that a defendant must show actual prejudice from an unpreserved claim of structural error to satisfy *Strickland*. See *Reid* v. *State*, 690 S.E.2d 177, 181 (Ga. 2010) (right to public trial); *State* v. *Butterfield*, 784 P.2d 153, 157 (Utah 1989) (same). Both courts reached this conclusion primarily due to their concern that a presumption of prejudice would encourage sandbagging by defense counsel: instead of objecting contemporaneously, the defense could strategically delay raising the issue and obtain automatic reversal on appeal if the jury issued an adverse verdict. See *Reid*, 690 S.E.2d at 181; *Butterfield*, 784 P.2d at 157. Yet neither opinion cites any evidence that such sandbagging has actually occurred. And for good reason: this Court has explained that "counsel's client has little, if anything, to gain and everything to lose through such a strategy." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 n.7 (1986); see *Winston*, 649 F.3d at 631 (responding to Wisconsin's allegation of defense counsel gamesmanship by observing that "[d]efense counsel is limited to 'legitimate, lawful conduct,'" and that "[w]e do not know where the state is getting its data from, but we hope that it is mistaken about the frequency of deliberate constitutional violations on the part of the defense bar" (citation omitted)); see also Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1196-1199 (1986) ("[C]ommentators * * *

are nearly unanimous in agreeing that the risk of deliberate withholding of claims * * * is very small."). In any event, structural errors are limited in scope and should be obvious to the trial court (and the prosecution), such that they should never be committed, even with an acquiescing defendant.

A decision from this Court establishing a framework for how to evaluate *Strickland* prejudice for the denial of a defendant's right to a public trial, a paradigmatic structural error, would provide much needed guidance to the lower federal courts and state courts for a range of procedural contexts in which claims of unpreserved structural errors arise, and will help remedy stark inequities that currently exist for defendants based on the forum in which they are prosecuted or the happenstance of where they live.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

JOINT APPENDIX

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COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT

Commonwealth v. Weaver

No. SUCR2003-11293

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
106	06/08/2011	Notice of docket entry received from the Supreme Judicial Court. - Motion For New Trial. (Remanded to Superior Court)
		* * *
110	10/21/2011	Commonwealth files Memorandum in opposition to the defendant's motion for a new trial pursuant to MRCP 30(b) (Hines, J and R. Greenbert, Atty notified)
111	10/26/2011	Deft files Reply to the Commonwealth's opposition on the issue of public trial (Hines, J and A. Kalluri, ADA notified)
		* * *
115	03/21/2012	Hearing on the Defendant's Motion for a New Trial.
		* * *
117	04/23/2012	Commonwealth files

NO.	DATE	DESCRIPTION
		supplemental memorandum in opposition to Deft's motion for new trial pursuant to Mass Crim P. 30(b)
118	04/23/2012	Deft files proposed findings
		* * *
131	02/25/2013	Deft files Memorandum of decision and Order for new trial, filed. MOTION (P#131) denied Hines, J. (Copies mailed)
		* * *
155	03/13/2015	NOTICE of APPEAL FILED by Kentel Myrone Weaver

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Weaver v. Commonwealth

No. SJC-10932

RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
1	03/09/2011	Entered. Notice to counsel.
2	03/23/2011	APPEARANCE of Ruth Greenberg, Esquire for Kentel Myrone Weaver. (Noted)
3	06/01/2011	MOTION FOR NEW TRIAL, filed for Kentel Myrone Weaver by Ruth Greenberg, Esquire. (Remanded to Superior Court) Notice sent.
4	06/01/2011	ORDER: Defendant's Motion for New Trial is remanded to Suffolk Superior Court.
		* * *
17	07/28/2015	APPEAL ON DENIAL OF MOTION FOR NEW TRIAL. Appellant's Brief/Appendix due 9/18/15.
		* * *
19	09/22/2015	SERVICE of brief & Appendix for Defendant/

NO.	DATE	DESCRIPTION
		Appellant Kentel Myrone Weaver by Ruth Greenberg.
		* * *
22	12/21/2015	SERVICE of brief for Plaintiff/Appellee Commonwealth by John P. Zanini.
	01/12/2016	Oral argument held. (Gants, C.J., Spina, J., Cordy, J., Duffly, J., Lenk, J.).
		* * *
31	07/20/2016	RESCRIPT (Full Opinion): The matter is accordingly remanded to the Superior Court for further proceedings consistent with this opinion. (By the Court)
		* * *
33	08/29/2016	Notice: Certiorari petition filed in U.S. Supreme Court.
34	01/23/2017	LETTER from Ruth Greenberg notifying the Court that a writ of certiorari was granted.
35	01/23/2017	Awaiting formal notice from the United States Supreme Court. Review of docket no. 16-240 indicates that the petition was granted on January 13, 2017.

Commonwealth *vs.* Kentel Myrone Weaver

SJC-0384CR11293

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Monday, March 26, 2012

MOTION FOR NEW TRIAL

PROCEEDINGS

THE CLERK: Your Honor, before the Court Commonwealth versus Kentel Weaver, Docket Number 2003-1129. Representing the Commonwealth is Assistant District Attorney John Pappas. The defendant is present and represented by his attorney, Ruth Greenberg. The matter is before the Court on a motion for new trial.

THE COURT: Good afternoon, everybody. I'm happy everybody is here. I saw Mrs. Weaver outside. Does she know where we are?

MS. GREENBERG: Yes. I had thought that since she was a witness she should wait outside.

THE COURT: Okay. That's fine. I didn't want anybody to be confused by the change in the location. Okay. So it's my understanding this that it is the defendant's burden on this case to prove that the courtroom was closed, and that it is the defendant's burden to either establish that there was some official judicial [5] act closing the courtroom or that it was closed in a constitutional sense. That's how I understand what we are doing here. Now I did receive Judge Neel's affidavit. It came in the mail on Friday afternoon. Counsel, did you all receive a copy of it?

MR. PAPPAS: Yes, Your Honor. And by agreement—I don't believe there is any objection, if I could have it marked as Exhibit Number 1.

THE COURT: All right. Thank you. (Exhibit Number 1 marked; Affidavit of J. Neel.)

THE COURT: Okay. So without further ado, we are ready to proceed. You may call your first witness.

MR. PAPPAS: One last housekeeping matter, Your Honor.

THE COURT: Yes.

MR. PAPPAS: Can we have a [6] sequestration order for purposes of this hearing.

THE COURT: Sure. All right.

MS. GREENBERG: My first witness is in the courtroom, Mr. Davis.

THE COURT: Your first witness is in the courtroom?

MS. GREENBERG: He is.

THE COURT: Oh, okay.

MS. GREENBERG: But before I call Mr. Davis, I just wanted to speak briefly to law and just kind of lay out the opening.

THE COURT: Sure. All right.

MS. GREENBERG: Your Honor, I have three witnesses here today. I have Susan Dunigan who will testify that she was excluded. I have Iris Weaver who will testify she was excluded. These are to establish that that courtroom was closed for jury selection, and that people were excluded. It's not necessary for me to show that it was a judicial act. It can be an act by a court officer.

THE COURT: No, no. That's what I mean. Yes. By extension. [7]

MS. GREENBERG: Right. And then I have Mr. Davis who will testify as to the absence of waiver, which is the second thing that I need to show. So I'm going to call Mr. Davis first because he has somewhere he needs to go.

THE COURT: Okay.

WILLIE DAVIS, SWORN.

THE COURT: Good afternoon, Mr. Davis.

THE WITNESS: Good afternoon, Your Honor.

THE COURT: Counsel, you may proceed.

MS. GREENBERG: Thank you, Judge.

DIRECT EXAMINATION BY MS. GREENBERG:

Q: Mr. Davis, were you trial counsel for Mr. Weaver in this case?

A: Yes, I was.

Q: At the time the case was tried, were you aware that Mr. Weaver had the right to have the public present during his jury selection? [8]

A: I was not aware.

Q: And you never discussed this question with Mr. Weaver?

A: Never had such a conversation with Mr. Weaver.

Q: And you had no strategic reason to keep the public out.

A: I had no reason whatsoever.

Q: And if you had known the public was allowed in, you would have made sure they could be here?

A: If I had known that the public had a right to be here, I would have insisted or at least discussed it with the defendant as to whether or not he wished to have them here.

Q: But there was no discussion?

A: There was no discussion.

Q: Thank you.

MS. GREENBERG: Judge, that's all I have.

THE COURT: Mr. Pappas.

CROSS-EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, sir. [9]

A: Good afternoon.

Q: Obviously, we're talking about Commonwealth versus Kentel Weaver. Do you remember what year the case was tried in, sir?

A: No, I do not.

Q: If I were to say it was tried in April of 2006, would that ring a bell?

A: It would not ring a bell, but I will accept that.

Q: And as far as the questions that counsel asked you about, do you remember the trial itself?

A: Yes, I do.

Q: Okay. And do you remember how long it took to pick a jury in this case?

A: No, I do not.

Q: Do you remember what courtroom it started in?

A: I can only tell you it was either on the eighth or the ninth floor, but I have no recollection of which courtroom.

Q: Do you recall whether or not jury selection took more than a day, sir?

A: No, I do not. [10]

Q: And if I were to tell you that jury selection spanned two days from Friday, April 7th, into Monday, April 10th, would that refresh your memory at all?

A: No, it would not.

Q: And you have a recollection of who the case was tried in front of?

A: I—I'm not sure. I've been talking with counsel for the defendant now, and she tells me it was Judge Neel, but—I think, but I don't have an independent recollection that it was Judge Neel.

Q: You're familiar with the—with the courtrooms in this courthouse.

A: Oh, yes.

Q: You've tried a lot of cases?

A: Oh, yes.

Q: And are you familiar with the courtrooms on the tenth and ninth floor here?

A: On the ninth, not the tenth.

Q: Okay. The ninth floor, fair to say that the courtrooms are approximately the same size as the courtroom we're in right now?

A: Well, if I'm not mistaken, I think [11] maybe on the ninth floor one—a couple may be larger.

Q: Do you have any memory—fair to say that you don't have a memory of whether or not the courtroom was locked? To your memory was it locked at all?

A: No. Not on this case, no, I don't.

Q: You don't have any memory of that?

A: I don't have any memory of the courtroom being locked, no.

Q: Okay. You were aware and had some extensive contact with your client's mother, Iris Weaver, leading up to and including during the time of the trial of this case?

A: Up to the trial. I don't think I had very much contact during the trial.

Q: Were you aware—did you know of a woman who was providing pastoral support in the name of Susan Dunigan? Did you meet her?

A: Yes, I did. I believe—Major Dunigan I believe it is.

Q: Yes.

A: From the Salvation Army?

Q: Yes. [12]

A: Yes, I do.

Q: Okay.

A: I don't know if I would recognize if she walked in the door unless she had on a uniform, but I remember her.

Q: And do you remember her being present at a motion to suppress statements that was litigated in front Her Honor, Judge Hines?

A: That went over a period of time. I'm pretty sure she was, yes.

Q: Okay. As far as the beginning of the trial of this particular case in April of 2006, at any point did Iris Weaver come up to you during jury selection and tell you she was not allowed into the courtroom?

A: I have no recollection of that.

Q: Okay. At any time did Susan Dunigan come up to you during the jury selection period of this case and tell you she was not allowed into the courtroom?

A: I have no recollection of that.

Q: Are you aware of another family member, an individual by the name of Paul Smith? [13]

A: I believe—yes. Yes, I do. I remember him.

Q: Okay. And was he present intermittently during the trial?

A: I don't know.

Q: Do you have any memory of him coming up to you and telling you he was not allowed into the courtroom?

A: I have no such memory.

Q: So you have no memory at all of any of those three people, Iris Weaver, Susan Dunigan, or Paul Smith, telling you during jury selection that they were not allowed into the courtroom?

A: No, I do not.

Q: Now you knew that they were present, correct?

A: Well, I knew they were present when we started taking evidence. Yes.

Q: Okay. And in fact, do you recall drafting a motion in limine asking certain family members of your client to be exempt from the sequestration order?

A: I do that routinely, so yes. I do [14] that automatically if a family member is going to be a witness, especially a parent, I draft a motion asking that they be excluded from the sequestration order.

Q: And you drafted a—did you draft such a motion in this particular case?

A: I believe I did, yes.

Q: And you knew that understanding that Iris Weaver was likely to be a critical witness in the case itself—

A: Oh, she would be essential, yes.

Q: Essential. Okay. And I just want toshow you, this is an unsigned copy of a pleading. Do you recognize that pleading, sir?

A: This is something that I would normally file in the event that a family member was going to be a witness for the defense or going to be a witness the prosecution. I would ask that they be exempted from the order of sequestration because I had filed a motion for sequestration myself.

Q: Okay. And does this look like the motion you filed in this particular case?

A: All I can tell you is that's the [15] motion—that's the type of motion that I would have filed.

Q: Okay.

A: Whether or not the language is the same, I can't tell you.

Q: Well, just looking at this particular caption "Commonwealth versus Kentel Weaver," and then it addresses the name "Iris Weaver"—

A: Iris Weaver.

Q: —you would agree with that?

A: I would agree with that, yes.

MR. PAPPAS: Your Honor, for purposes of this hearing, may this be marked as the next exhibit?

THE COURT: Exhibit 2. (Exhibit Number 2 marked; Sequestration motion in limine re: Iris Weaver.)

Q: So fair to say that given the nature of the evidence in this particular case, the relationship of Mrs. Weaver to her son, Major Susan Dunigan in support of Mrs. Weaver, you [16] certainly contemplated before the trial started that family support is necessary for the defendant at trial, correct? You contemplated it before trial.

A: I don't really know how to answer that. That's always important. Family is important. It's always important. So not just this trial, but all trials.

Q: All trials.

A: Yes.

Q: So like you said, that would be something that you would routinely do—

A: Yes.

Q: —in every trial.

A: Oh, yes.

Q: And this case was no different, correct?

A: No different.

Q: Okay. Now understanding that that's something you routinely did, I'm just looking at your affidavit where it says, "At no time did I discuss with the defendant to have the support of his family and friends in the courtroom." [17]

A: During jury selection, no.

Q: Okay. And you said that you never discussed that with your client, correct?

A: No, I never did.

Q: And—

A: Not prior to the jury being impaneled and proceedings getting started, that is, the testimony.

Q: And if you knew that, that they had a right to be present, you certainly would have raised it.

A: I'm sorry?

Q: You said on direct that if you knew they had a right to be present, you certainly would have raised it.

A: I didn't say that.

Q: Well, maybe you can correct me.

A: I never said that. If you're asking me now would I, the answer is yes.

Q: Okay. But back then were you aware that the public had a right to be present?

A: No.

Q: Okay. And so what I'm asking you in followup to that is if you had known it back [18] then would you have raised it?

A: If I had known that the jury—I mean, that the public had a right—the defendant rather had a right for the public to be present during jury impanelment, I certainly would have raised the issue with the trial judge.

Q: Okay. Now you've been a trial attorney—

A: Fifty years.

Q: Longer than I've been alive.

A: Yes. Longer than you've been alive, yes.

Q: And you've tried—

A: That's not casting aspersions on you though, Mr. Pappas.

Q: Thank you, Mr. Davis. Now understanding that you've tried many, many, many cases in the trial courts in this Commonwealth, correct?

A: That's correct.

Q: And fair to say that you've handled a number of cases over the years in the appeals court, both in front of the Massachusetts [19] appeals court here and the Supreme Judicial Court.

A: Not—I don't want to appear braggadocios, but I don't think anybody practicing now has been there more than me.

Q: Okay. Do you remember a case—now understanding that this case was tried in 2006, Commonwealth versus Kentel Weaver, do you remember a case back—that was decided in 1996, *Commonwealth versus Bentry Gordon*?

A: Absolutely.

Q: Do you remember that case?

A: I certainly do.

Q: Okay. And do you recall that's a case that you were actually the trial attorney.

A: I was one of them. There were five different—defendants in that case.

Q: And on this particular case, at least with respect to some of the attorneys on appeal, you followed the case up on appeal?

A: I was allowed to do that, yes.

Q: Okay.

A: That was prior to the CPCS rule concerning trial counsel not handling the [20] appeal.

Q: And that case was decided—would you agree with me that it was decided in 1996?

A: There are two *Gordon* cases in the SJC. I don't know the date or—which was first, but one was pretrial and the other was post- trial.

Q: I'm just going to show you this document—excuse me one second. I'm going to show you this document, sir. Just directing your attention to the top where it says, "*Commonwealth versus Bentry Gordon.*"

A: "Sean Lee, Bentry Gordon, Ronald Settles," yes.

Q: Okay. And you would agree with me that this was decided in June of 1996?

A: Yes, it was.

Q: And you recall being appellate counsel on that particular case?

A: I was appellate counsel for Bentry Gordon.

Q: And do you recall one of the issues being decided in that case—or one of the issues addressed in that case was that the [21] rights of a defendant to a public trial? Do you recall that, sir?

A: No.

Q: Including specifically members of the defendant's family—

A: No, I do not

Q: —that that issue was addressed?

A: No. I don't have a memory of knowing about it at that time. I have read it since because I have cited it in a couple of cases within the last year or two.

Q: Okay. And having read it since, are you talking about since 2006 or prior to 2006?

A: Well, actually it has been since 2006 my recollection of running across the case doing research was actually a little more than a year ago when I was doing a case up in Essex County.

Q: So part of being, you know, a successful attorney like yourself, Mr. Davis, when a case goes up to the Supreme Judicial Court and is argued, is it fair to say that you would have an interest in reading the decision once it comes down? [22]

A: Not all the time. I—no. There's no way—I can't sit here and say that I would read every case that comes down from the SJC. Not even every criminal case.

Q: Not every case. I'm talking about just the ones that you yourself argue and appear on on behalf of the client to the Supreme Judicial Court.

A: And actually, I can't say yes to that either for the simple reason that quite often cases go up, you know what the result is going to be. You take the case up because you're obligated to do so. And you know, you might scan it after when you see that it has been affirmed, but you don't necessarily read the whole case.

Q: So is your answer for purposes of this hearing that as it relates to the issue of courtroom closure and the right to a public trial being violated, you weren't aware of that issue prior to 2006?

A: May I explain?

Q: Certainly.

A: I did not raise the issue. As I said, [23] there were five lawyers in that case. I have asked around since this case came up who did it, and I believe it was Bob Sheketoff. He raised the issue. It was not written—the issue was not briefed by me. It was briefed by Bob Sheketoff. I did not read his brief in advance. I read mine, and that certainly was not an issue I raised in mine. So it was Bob Sheketoff's issue that—where he raised the issue about closure of the courtroom.

Q: And did you review the decision in the *Bentry Gordon* case prior to testifying today?

A: I reviewed that about—no, I didn't. I did about a year ago when I was preparing a motion for a new trial up in Essex County.

Q: Okay. At any rate, neither Ms. Dunigan nor Mrs. Weaver approached you and gave you any information saying that they had been excluded from the courtroom?

A: I have no recollection of that.

Q: Okay. And that would have been at the time the trial commenced during jury selection.

A: I have no recollection of them approaching me. [24]

Q: And fair to say you knew exactly who those two women were as you testified?

A: Of course. Of course.

Q: Okay. As what point did you find out?

A: Find out what?

Q: That they had been excluded.

A: When they—I was called I believe by present counsel and asked about it.

Q: And how did that take place?

A: She was appointed to do the appeal, and she opted to do a motion for a new trial raising this issue. And naturally she called me to see if I was aware of it, and I was not aware of it.

Q: And fair to say that your affidavit doesn't state anything about either Mrs. Weaver or Susan Dunigan approaching you and saying they had been excluded, correct?

A: I don't know. I haven't—I gave the affidavit, but that was a few weeks ago. I don't know what it said. Would you show it to me, please.

Q: (Counsel complies.) Do you recall the affidavit now, sir? [25]

A: Yes.

Q: So there is nothing in here about you having any memory whatsoever or a lack of memory about

either Mrs. Weaver or Ms. Dunigan approaching you on that issue, the courtroom-closure issue.

A: That's not why I was asked to give the affidavit. So no. It's not in there.

MR. PAPPAS: And just for purposes of the record, Your Honor, at least as it relates to this particular portion of the hiring, I would like to make a record that the defendant is waiving his right to attorney-client privilege relative to the next questions I'm going to ask about waiver.

MS. GREENBERG: Judge, if we can go through the waiver questions one at a time to see if he has an objection, Judge.

THE COURT: Did you all discuss this before now?

MS. GREENBERG: Judge, we had a motion hearing on it, and we agreed the Commonwealth would ask questions, and I would object if I needed to. [26]

THE COURT: Go ahead, Mr. Pappas.

Q: At any time during the trial did you have a discussion with your client about the courtroom being closed?

A: I don't have any recollection of having any discussion with Mr. Weaver at the beginning of the trial or any time during the trial about the courtroom being closed.

Q: So fair to say based on your testimony today that's because you didn't have a reason to?

A: What do you mean?

Q: No one approached you about the courtroom being closed, or not being allowed into the courtroom.

A: No. Nobody approached me that I remember.

Q: And I should make that distinction. And to your knowledge, as you testified earlier, you said that to your knowledge the courtroom wasn't closed, correct?

A: I didn't know whether it was closed or not. I can tell you what was the routine at that time and for the last—up until a couple [27] of years ago, it was routine that—especially in murder cases when they had a lot of jurors in a small courtroom that the courtroom would be closed until the jury selection process was completed, and then the public would be allowed back into the courtroom, or an alternative, which I have been involved in occasionally, jurors—individual voir dire were being conducted in the lobby. That has happened a couple of times too.

Q: Mr. Davis, at any point in time did you discuss any of the motions in limine that you filed on behalf of your client? Did you discuss those with Mr. Weaver?

MS. GREENBERG: I'm going to object here.

A: I don't remember what I discussed—

THE COURT: The objection is overruled.

A: I don't remember what I discussed with Mr. Weaver pertaining to a particular motion in limine. I don't. Which one are you taking about?

Q: The one that would be most relevant, [28] and that would be the motion to exempt certain family members from the sequestration order.

A: Well, I'm pretty sure I told him that I would seek to have his mother and Mr.—I believe Mr. Smith it was. Was it Mr. Smith? Permitted to be in the courtroom while other testimony was being given

considering the fact that I believed both were going to be witnesses for the Commonwealth.

Q: Okay. So not—I just want to be clear for purpose of this hearing. Are you making a distinction between the trial and jury selection?

A: Yes.

Q: So—did you specifically explain to him that you were making that motion in limine to exempt family from the sequestration order just at it related to the trial?

A: Just as it related to the trial. In other words, I thought it important that his mother - especially his mother - hear the testimony coming from the witnesses against her son.

Q: Okay. And you didn't think it would [29] be important to have them in there for jury selection?

A: No, I did not.

Q: And is that—

A: It never crossed my mind.

Q: Is that based on your understanding of past practice and what you were particularly familiar with during jury selection in murder cases?

A: Absolutely. I can tell you this without fear of contradiction. At that time, in that era, there were very few trials, if any, where the public was in the courtroom, especially when the courtroom was crowded.

Q: And again, at no point did either Mrs. Weaver, Ms. Dunigan or Mr. Smith come to you and tell

you that they were not allowed in the courtroom during jury selection?

A: I have no recollection of either one of those people approaching me to tell me that they were not allowed in the courtroom.

Q: Thank you, Mr. Davis.

MR. PAPPAS: That's all I have.

THE COURT: Any redirect? [30]

REDIRECT EXAMINATION BY MS. GREENBERG:

Q: Mr. Davis, this was decided in June of 1996; is that correct? Just for the record.

A: According to here, it was decided June 10th of 1996.

Q: And this trial was in April of 1996, so before this decision.

THE COURT: Which trial?

MS. GREENBERG: Mr. Weaver's trial.

THE COURT: No, no.

MS. GREENBERG: No. It was after.

THE COURT: Yes.

MS. GREENBERG: All right.

Q: And you were not trial counsel?

A: Yes, I was trial counsel.

Q: You were trial counsel, but you were for Mr. Gordon.

A: I was for Mr. Gordon. And as I said, there were five defendants in that case, and I think of the five, four—one was acquitted, and four went up on

appeal, and I represented Mr. Gordon on appeal. And the issue, as I have—as I explained to Mr. Pappas about the jury—courtroom closure during jury selection, I [31] believe was raised by Bob Sheketoff, and it had not—it did not concern jury selection for the trial. It concerned something else as I recall.

Q: Okay. Thank you.

A: And I'm only recalling now because I—you know, I read it in preparation for coming here.

Q: Okay. Thank you.

MS. GREENBERG: Thank you, Judge.

RECROSS-EXAMINATION BY MR. PAPPAS:

Q: At the SJC argument for Bentry Gordon, you were one of five attorneys present?

A: One of four, and the—it was not brought up at oral argument. That was one of those that was in the brief, but I don't have any recollection of either lawyer for the defense or the prosecution making an oral argument to that effect. We had too many issues and so little time for argument, so I'm pretty sure about that.

MR. PAPPAS: That's all I have, Your Honor. [32]

THE COURT: You may step down, Mr. Davis.

THE WITNESS: Thank you.

THE COURT: Ms. Greenberg.

MS. GREENBERG: Judge, can I just ask Major Dunigan to come in?

THE COURT: Well, the court officer will do that for you.

MS. GREENBERG: Great. Thank you. Major Susan Dunigan from the Salvation Army.

SUSAN DUNIGAN, SWORN.

THE COURT: Good afternoon.

THE WITNESS: Good afternoon, Judge.

THE COURT: You may proceed, counsel.

MS. GREENBERG: Thank you, Judge.

DIRECT EXAMINATION BY MS. GREENBERG:

Q: Major Dunigan, can you state and spell your name for the record.

A: Major Susan Dunigan, D-U-N-I-G-A-N.

Q: And can you tell the Court and state for the record what is that uniform that you're [33] wearing?

A: I wear the uniform of a Salvation Army officer. I am ordained and administrate the Salvation Army kroc center neighborhood outreach in Camden, New Jersey. I've gone through two years of Salvation Army training school and have been ordained and run Salvation Army programming for twenty-seven years.

Q: And can you tell us if you know Iris Weaver?

A: I do know Iris Weaver.

Q: And can you tell us how you came to know her?

A: Iris Weaver was a member of the Salvation Army Jubilee House at 10 Melville Avenue, Dorchester, Massachusetts, and continues to be so, so I have known her for approximately thirteen years.

Q: Did you come to the two days of jury selection in Kentel Weaver's trial?

A: I came Mrs. Weaver those days.

THE COURT: Could you speak up a little bit, Ms. Greenberg. The wind I howling out there. [34]

Q: And what happened when you came?

A: I attended every day with Mrs. Weaver as her pastoral support. We came very early in the morning, first thing, and we were told to sit in the hallway.

Q: This was the first day of jury selection?

A: Friday and Monday as well.

Q: So on the Friday, when you go there were you early or late? When did you get here?

A: Because Iris comes usually first thing in the morning, I would meet her here. Eight years ago I can't approximately remember. Nine o'clock. She was always here before I was, and we were waiting in the lobby.

Q: By "the lobby," what do you mean?

A: Outside the courtroom doors, in the hallway on the bench.

Q: And were the courtroom doors locked when you came here? When you came in because it was early?

A: Yes. I think so.

Q: And what would happen when you tried to go—what happened that Friday when you [35] tried to go in?

A: Well, we really just asked what are we supposed to do now, now being familiar with court

proceeding, and they said: You need to wait right here in the hallway.

Q: And then what happened?

A: And then the jurors filed past into the courtroom, and we were told to wait, continue to wait, there and not to talk to the jurors and not to say anything else. I was praying with Mrs. Weaver at the time.

Q: And were you allowed to go into the courtroom with the jurors?

A: No, we were not.

Q: What were you told?

A: To wait in the hallway.

Q: Until when?

A: Until someone told us to come in.

Q: And then what happened?

A: So we just continued to wait, and then I asked why we were waiting, and it was because the potential opening statements that the court could proceed, and so we didn't go home, and then because there were so many jurors at the [36] time, we—it was closed, and then we came back the next day, the next week, on Monday, and the same process happened.

Q: So—

A: Which we thought was what we were supposed to do.

Q: So were you told you could not come in until the jury selection was complete?

A: To my best recollection, yes. We were waiting until that process was complete for opening arguments.

Q: And the person in the courtroom that told you that, what—was it a court officer? Like what were they wearing? Describe that.

A: They—to my best recollection it was a court officer in uniform, but I can't—it was over eight years—it was approximately eight years ago, and I do not recall if it was a member of the DA's office or if it was a court officer. I cannot recall exactly.

Q: Do you recall the outfit? A uniform?

A: I know we had lots of conversations. The trial was very extensive, so we had many conversations with court officers, such as are [37] seated in the courtroom today.

Q: That outfit?

A: Yes.

Q: The outfit that the gentleman sitting over here is wearing?

A: Yes.

Q: Did you get to see any of the jury selection?

A: No.

Q: Were you there both jury selection days?

A: Yes.

MS. GREENBERG: I have no further questions, Judge. Thank you.

THE COURT: Mr. Pappas.

CROSS-EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, ma'am.

A: Good afternoon.

Q: Major, I'm in receipt of a document, a letter, written to a Ruth Greenberg, Attorney at Law, 505 Paradise Ave., Swampscott, and I just want to show you this document. Do you recognize it? [38]

A: Yes, I do.

Q: And you prepared this document, it's a photocopy?

A: Yes, it is.

Q: And this particular document, ma'am, do you remember when you generated it? What was the date of it?

A: No. I don't remember offhand. It was approximately in—I'm thinking January, but it might have been—no. It was earlier.

Q: January of what year?

A: Of this year I think.

Q: 2012?

A: Yes. I cannot remember. I know it was either in the fall—I don't know because we were waiting—no. I don't know. It was either in the fall or in January. I'm not sure.

Q: Can you narrow it down to the year?

A: 2011.

Q: 2011.

A: I would say the fall of 2011. I can't remember when the lawyer first contacted me.

Q: Okay. So this was generated after you [39] were contacted by Ms. Greenberg?

A: Yes.

Q: Okay. And before you prepared this letter that you signed under the pains and penalties of perjury, did you have any conversation with Iris Weaver before you drafted this letter?

A: No, I did not.

Q: Okay. And what was the extent of the conversation that you had with Ms. Greenberg before you drafted this letter?

A: From her phone call?

Q: Correct.

A: She told me that she was Kentel Weaver's attorney, and that she would like to talk to me regarding the proceedings of Kentel Weaver's trial and my responsibility as pastoral support for Iris Weaver.

Q: Okay. And how did the—how was the subject of the courtroom—you're not being allowed access to the courtroom, how was that initiated?

A: She asked me at length to describe the weeks that we spent here in this courtroom–[40] this court building and what actually happened during those weeks.

Q: Okay. I don't want to cut you off, but I want to direct your attention as it relates this hearing so that we can focus. I want you to focus on the jury selection that you just testified on direct examination, the first two days, that Friday and that Monday.

A: Correct.

Q: How was that initiated during your conversation with Ms. Greenberg?

A: She asked us did we participate in the jury selection.

Q: Okay. Now this was some—fair to say some five-plus years after the actual trial happened in 2006?

A: Correct.

Q: And did you have a specific recollection at that point that some person or some persons told you couldn't go into the courtroom?

A: Correct.

Q: Do you have a specific recollection of who that person was? [41]

A: No.

Q: Now you said on direct that to the best of your recollection you thought it was a court officer?

A: Yes, sir. But as you know in my letter, I said it could have possibly been somebody from your office.

Q: Okay. And just so we're clear, by "a court officer," you're talking about uniform personnel, similar to the two gentlemen to my right—

A: Correct.

Q: —that are wearing white shirts, long-sleeve shirts, with dark blue pants?

A: Correct.

Q: Those would be the court officers.

A: Correct.

Q: And who would you be referring to when you talk about an assistant to the DA?

A: The young man who is currently sitting in the hallway with glasses.

Q: Okay. Do you know his name?

A: No, I do not.

Q: And it's your testimony that it was [42] either that person, who is outside in the hallway that you recognize as working in the DA's office, or a court officer, a court officer who said you couldn't go into the courtroom.

A: Correct.

Q: And did that happen on one or both days of jury selection?

A: Both occasions.

Q: Do you have a specific recollection that jury selection took two days?

A: Yes, I do.

Q: Okay. On two different floors in this courthouse?

A: Yes, I do.

Q: And fair to say you would agree with me that those courtrooms where the jury selection and the ultimate trial took place were fairly small courtrooms?

A: Yes, sir.

Q: As far as the gallery goes.

A: Yes, sir.

Q: And would you agree with me that the size of those courtrooms where jury selection [43] started

on Friday, April 7th, and they concluded on Monday, April 10th, were about the size of the courtroom we are in right now?

A: I'm not sure.

Q: As far as the gallery goes.

A: Approximately. I cannot say that for sure.

Q: Okay. Now just going back in time a little bit, Major Dunigan, prior to the trial, fair to say that you provided pastoral support to Mrs. Weaver even before her son, Kentel, got involved in this incident?

A: Correct.

Q: Okay. So if I were to tell you that this particular—the matter that he was tried for, the murder of Jermaine Rutger (phonetic), occurred in August of 2003, you've had a relationship with Iris Weaver prior to that date?

A: Correct.

Q: For how many years, ma'am?

A: Approximately six years prior.

Q: Six years prior. So roughly in about 1997— [44]

A: Yes.

Q: —when you first knew her?

A: Correct.

Q: And did you become aware—shortly after the incident involving Jermaine Rutger and then ultimately the charges being brought against Kentel Weaver, you became aware of that case?

A: Correct.

Q: During the pendency of Kentel Weaver's case, and in fact, preceding that, let me ask you—strike that. I'll ask a better question. During the time that you knew Mrs. Weaver, starting in 1997, you knew that she had another son, Kassine Weaver (phonetic)?

A: Correct.

Q: And you knew Kentel, Kassine, Iris Weaver, Paul Smith, you knew the whole family for a number of years?

A: Correct.

Q: How would you describe your relationship with them, ma'am?

A: I was for thirteen years Iris Weaver's [45] pastor.

Q: And you knew that her son, Kentel, was being charged, and the circumstances under which he was charged was a difficult time for her, a very difficult time for her emotionally, correct?

A: Correct.

Q: And you did your level best during that entire time to offer her any support that you could?

A: Correct

Q: And you continue to do that to this day?

A: I've been transferred to Camden, New Jersey—

Q: As best you can,—

A: Yes.

Q: —given your current location.

A: Correct.

Q: You have maintained a relationship with her?

A: We exchange Christmas cards.

Q: Okay. Occasional phone calls?

A: She does not initiate the phone calls [46] because—but I have family who live in the area, and occasionally I will stop by Burger King to say hello.

Q: And she was working at Burger King back when this happened in 2003?

A: Correct.

Q: And fair to say that when this happened and to this day, you would do whatever you could to help her, correct?

A: Within the bounds of moral integrity.

Q: Sure. Now getting back to the family. You're also aware during the pendency of Kentel's case that in 2004 her other son, Kassine, was the victim of a homicide, correct?

A: Correct.

Q: And you're aware that in 2006, April of 2006, Kentel's case went to trial, correct?

A: Correct.

Q: Were you present a couple of months later, in July of 2006, when the person alleged to have murdered Kassine Weaver when that case went to trial?

A: Correct.

Q: And that was just a couple of months [47] later, correct?

A: Correct.

Q: And just like you were with Iris Weaver during the entire trial of Kentel Weaver, you were also present with Mrs. Weaver for the entire trial for the person alleged to have murdered Kassine Weaver?

A: I cannot guarantee that I was with Mrs. Weaver the entire trial for Kassine's murder, reason being is that she had a victim-witness advocate who was supporting her. The reason I was with her for Kentel's trial was Kentel was also a member of our church, and she was all alone and did not have a lot of support. So I cannot verify that I was with her throughout the whole trial for Kassine's murder trial.

Q: Okay. And that resulted in a conviction as well?

A: Correct.

Q: And that also was prosecuted—that case was also tried in this very courthouse?

A: Correct.

Q: No one—you have no memory of anyone [48] in that particular trial—strike that. Let me ask this. Were you present during jury selection for that case?

A: I do not know.

Q: Okay. Do you know if Mrs. Weaver was present during jury selection?

A: I do not know.

Q: Now as it relates to Kentel's trial, fair to say that on the first day of jury selection a large number of jurors were brought up?

A: Correct.

Q: You were out in the hallway?

A: Correct.

Q: Would you agree with me that the courtroom was filled to capacity with prospective jurors?

A: I do not know. I was not in the courtroom.

Q: Okay. And do you know if the courtroom was locked or not?

A: I do not know. I know when we came in the morning it was locked. [49]

Q: Okay. And when you say when you came in the morning that it was locked, that would be before court officially began?

A: Correct.

Q: Okay. Did you ever see the court officers locking and unlocking the doors?

A: No, I did not.

Q: Okay. Do you have a recollection of how many court officers were there on the first two days?

A: No, I do not.

Q: Okay. Do you have a recollection—so today you don't have a recollection whether it was a court officer or a representative from the Suffolk County District Attorney's Office who told you not to go in.

A: Correct.

Q: That you couldn't go in?

A: Yes. But I do have a recollection—it was one. Someone actually did say those things.

Q: So either a court officer or—

A: Correct.

Q: —someone from the DA's office. [50]

A: Yes, sir.

Q: And that person you identified as being out in the hallway today?

A: Possibly. We had several interchanges with that young man.

Q: Okay. Now

A: May I speak?

Q: There's no question before you.

THE COURT: No. You have to wait for a question.

THE WITNESS: Oh, I have to wait until he asks a question. I just had a thought, but okay.

Q: Now whether or not you know whether it was that individual who is out in the hallway from the district attorney's office, was it always the same person who told you that you couldn't go into the courtroom?

A: I do not have a recollection.

Q: Okay.

A: But we were told both days to stay.

Q: So either on day one or day two, it was someone who told you you couldn't go into the courtroom. [51]

A: Correct.

Q: And were you always with Mrs. Weaver?

A: Yes, I was.

Q: And when—I asked you about that someone, whether you're sure it was—whether you can be sure it was the same person or not, is there anyone else that you recognize from the district attorney's office who may have told you that you couldn't go into the courtroom?

A: You and that young man are the only ones that I recognize, facial recognition.

Q: Okay. And it certainly wasn't me who told you you couldn't go into the courtroom.

A: I do not have that recollection.

Q: Okay. Well, do you remember having any contact with me instead of—strike that. Do you remember having any contact with me beyond a "good morning" or an acknowledgment by way of a nod, any type of conversation between the two of us?

A: Throughout the whole court? Throughout the—

Q: Jury selection. [52]

A: Just jury selection. No, sir.

Q: Thank you. Did you have any contact—do you remember who Sergeant O'Leary was?

A: Yes, I do.

Q: And Detective McLaughlin?

A: Yes, I do.

Q: Okay. Did they ever—either one of those individuals on either day, Friday, April 7th, or Monday, April 10th, tell you you couldn't go into the courtroom?

A: Not to my recollection.

Q: Not to your recollection. But a moment ago you just said it was either a court officer or someone from the DA's office. So can we exclude the two detectives, Sergeant O'Leary and Detective McLaughlin?

A: Yes. It was not a Boston police officer.

Q: Okay. So we're talking about two distinct possibilities.

A: Right.

Q: And when you asked why you couldn't go in, what was the answer that was given to you?

A: I don't know if I questioned why we [53] could not go in. I assume not being familiar with judicial and court protocol that it was the rule that we were not to go in.

Q: Okay. So you never asked why?

A: No, I did not.

Q: We're clear on that. You never asked anybody why you couldn't go in.

A: I was assuming I was obeying the rules.

Q: Okay. All right. So you weren't told that you could come in—not come in until jury selection was complete or were you told that?

A: We were told we could not come in and wait in the hallway.

Q: Okay. And on both days you were here with Mrs. Weaver early in the morning?

A: Correct.

Q: And fair to say that when Friday ended you went home. You came back on Monday. Again, there were a large number of jurors?

A: Yes.

Q: Fair to say that you were out in the hallway? [54]

A: Yes.

Q: Is it also fair to say that there were jurors out in the hallway as well?

A: Yes.

Q: And do you have a recollection, ma'am, of people coming in, prospective jurors coming in, and out of the courtroom? Meaning jurors who were leaving, and then other jurors who were going in as the jury selection process was unfolding?

A: Yes.

Q: Okay. Do you have a recollection of seeing a court officer having to lock or unlock the doors for a juror, prospective juror, to be allowed access into the courtroom?

A: Not to my knowledge.

Q: And fair to say, ma'am,—I'll ask you this. Do you have a recollection of the actual doors to the courtroom being left open so that the jurors, prospective jurors, could just walk in?

A: No, I do not. I remember the court officer would open the door, and then a line of the jurors came in, and then the door was [55] closed.

Q: Okay. If you can answer this question, Major Dunigan, from time to time did you see—were you able to see the courtroom doors? You just testified that you saw a court officer opening and closing a

door whenever a prospective juror had to be allowed in?

A: Restate the question.

Q: Fair to say that you were seated in a position where you could see the court officer opening the door from time to time to let a prospective juror into the courtroom?

A: Yes. We were sitting on the benches in the hallway directly outside the courtroom.

Q: Okay. Fair to say that you never saw any type of sign on any courtroom door saying "Do not enter."

A: No. It was only a verbal.

Q: Okay. So there was never any—there was never any sign posted?

A: No.

Q: Okay. And are you aware—do you have any memory of telling Mr. Davis that you were not allowed entry into the courtroom? Did [56] you ever bring it to his attention?

A: I—not to my recollection. We thought that was just the rule, that we weren't allowed in. We were sitting on very hard benches for a very long time.

Q: So on day one when jury selection started towards the end of the day you didn't tell Mr. Davis anything at the end of that day when the jury was sent home and the proceedings were continued until Monday?

A: Conversation was just to: How is it going? When—are they—have they picked the jury? It was more conversation on when will he begin. He told us

that we would have come back on Monday for the possibility of opening arguments.

Q: Okay. And you're aware—do you have a memory that the jury—a full jury was seated that Monday, April 10th? If you do, ma'am.

A: I am not aware of it. I think it was, but I'm not aware if it was seated that Monday or the following day. [57]

Q: Okay. And do you—did you ever bring it to Mr. Davis' attention on Monday, April 10th, that someone told you you couldn't go into the courtroom?

A: Again, we thought we weren't supposed to, so we—we did not question the authority of the—whoever told us not to.

Q: So is the answer no?

A: No. Correct.

MR. PAPPAS: May I just have a moment, Your Honor?

THE COURT: Of course.

Q: At the end of the day on Friday, April 7th, ma'am, you saw Mr. Davis outside the courtroom?

A: To the best of my knowledge. I—again, eight years ago, trial lasting for a really long time, many, many conversations with Mr. Davis. But I know that we were told to come back again on Monday.

Q: Okay.

A: So I'm saying yes, but not one hundred percent sure.

Q: So is it fair to say that Mr. Davis—[58] that you were waiting in an area outside to speak—

A: The courtroom.

Q: —to Mr. Davis at the end of the day?

A: Correct.

Q: And you were with Mrs. Weaver.

A: Correct.

Q: And where were you in relation to the courtroom doors when you had this conversation with Mr. Davis?

A: I don't know exactly. All I remember is sitting, laying, standing, walking around the hallways for hours.

Q: Okay.

A: So it was outside the courtroom door.

Q: And by virtue of that conversation you knew—you certainly knew he was Kentel's attorney?

A: Correct.

Q: And he would have known of your presence at the court—

A: Correct.

Q: —that day on Friday?

A: Correct. [59]

Q: And you never brought it to his attention that someone told you, at least according to your affidavit, that you couldn't go into the courtroom.

A: Correct.

Q: Just backing it up to that Friday when court commenced, the first day of jury selection, did you see Mr. Davis at the beginning of the day?

A: I saw him enter the courtroom.

Q: Did you have any conversation with him?

A: Probably just a greeting.

Q: Some type of acknowledgment between the two of you?

A: Correct.

Q: Or the three of you?

A: Correct.

Q: During that entire time frame that you were at the courthouse, were you with Mrs. Weaver?

A: Yes, I was.

MR. PAPPAS: That's all I have right now, Your Honor. [60]

THE COURT: Any redirect, counsel?

MS. GREENBERG: No, Judge.

THE COURT: Thank you very much.

THE WITNESS: Thank you.

THE COURT: I appreciate your patience, staying over the weekend. Thank you. Your next witness, counsel.

MS. GREENBERG: Iris Weaver, Judge.

THE COURT: Mr. Pappa, you brought your witnesses in today?

MR. PAPPAS: The three that I could, Your Honor.

THE COURT: I doubt if we're going to get to them today, all of them.

MR. PAPPAS: I hope we do, or Your Honor, maybe we could do two of them.

THE COURT: Okay.

MR. PAPPAS: If we have enough time.

THE COURT: All right.

MR. PAPPAS: Whatever the Court's pleasure.

THE COURT: Yes.

IRIS WEAVER, SWORN. [61]

THE COURT: Good afternoon.

THE WITNESS: Good afternoon.

DIRECT EXAMINATION BY MS. GREENBERG:

Q: Mrs. Weaver, can you say your full name for the record.

A: Iris Weaver.

Q: And are you related to Mr. Kentel Weaver who is here in the courtroom with us today?

A: Yes. I'm his mother.

Q: Did you come to this courthouse for the jury selection for the murder trial of this case?

A: No. I didn't. I came, but I didn't get in.

Q: Did you come to the courthouse?

A: Yes, I did. I'm sorry.

Q: What happened?

A: The—it was either a lady or a man, I believe it was a woman. And I was sitting outside; and

when I went to come inside, she said that it was closed for jury selection. And so we waited—I sat outside and waited [62] for the rest of the people to come.

Q: There were two days of jury selection in this case. Did that happen both the days?

A: That's correct.

MS. GREENBERG: I have no further questions.

THE COURT: Okay.

CROSS-EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, ma'am.

A: Good afternoon.

Q: How are you?

A: Good. Thank you.

Q: Mrs. Weaver, do you have a memory that the jury selection in your son's case took two days?

A: Yes.

Q: Okay. Do you have a—this was in 2006?

A: I can't remember the year.

Q: Irrespective of the year, 2006, was it the same woman who told you you couldn't go into the courtroom until the jury was picked?

A: I'm not for sure if it was a woman or [63] a man. I know it was one of the people in a white shirt, like the clerks.

Q: Okay. And I—"a white shirt, like the clerks," are you referring, ma'am, to the uniform similar to the gentleman I'm pointing to, the court officer,

wearing a long-sleeve white shirt with a badge, a tie and blue pants?

A: That's correct.

Q: Okay. So if I refer to the person how told you you couldn't get in as a court officer, would that be fair?

A: That's correct.

Q: Now was this on both days? Did this happen on both days?

A: That's correct.

Q: Okay. And was it a male or female court officer?

A: That told me? I'm not for sure of—male or female. I know it was an officer.

Q: Okay. Could it have been a male one day, and a female the second day?

A: It had to be a male or a woman, but it was an officer.

Q: Did you see a female court officer? [64]

A: That day—I can't remember if I seen a female officer on that date. Right now I can't remember.

Q: Okay.

A: I know it was an officer because that would be the only way I couldn't get into the room.

Q: Yes. And do you remember if the officer that you had the dealings with was white, black, Asian, Hispanic, any—

A: White.

Q: White. Okay. And definitely a court officer. You were with Major Dunigan the entire time?

A: Yes. She was here that day.

Q: She was there to offer you support?

A: Yes.

Q: And prior to the trial, did you have any contact with your son, Kentel, and let him know that you were going to be at the trial before it started? Did you visit him in jail?

A: I can't recall.

Q: Okay. Do you remember jury selection taking two days? [65]

A: Yes.

Q: And do you remember it taking place in two different courtrooms in this building?

A: I don't recall.

Q: Okay. Do you remember being out in the hallway and a lot of jurors coming upstairs?

A: Yes.

Q: Did you see Mr. Davis in the morning before jury selection started?

A: I don't know whether it was right before it started or during he course of it, but I did see him those days.

Q: Okay. Did you ever tell him either on Friday or on Monday that you were not allowed into the courtroom?

A: He knew this. He talked to us out there.

Q: Okay. So he knew you didn't get in.

A: Correct.

Q: Okay. You let him this?

A: He knew this.

Q: Okay.

A: He knew why we were sitting there [66] because he came into the courtroom, but we couldn't come in.

Q: And what I'm asking you, ma'am, just a follow up of that, Mrs. Weaver, did you tell him at some point either on Friday or on Monday that you weren't allowed into the courtroom?

A: No. I might have asked. I can't recall that I did.

Q: Okay. But he knew you were there.

A: Yes. He talked to me.

Q: And he knew you were out in the hallway?

A: Yes.

Q: And were you told just once on Friday and once on Monday during jury selection—and all these questions I'm asking you just have to do with that Friday and that Monday, ma'am. Were you told just once that you couldn't go in until the jury was picked?

A: No. Because when we went—I guess it was a break or lunch or whatever, and then when we came back, I tried to get in, and I still couldn't get back in.

Q: Okay. Did you ever ask to go back in? [67]

A: Yes.

Q: And did you ask a court officer?

A: Yes.

Q: And did you get the same response?

A: Correct.

Q: Okay. Fair to say that you never saw--were you seated—let me ask you this. Were you seated out in the hallway on one of those long wooden benches?

A: Correct.

Q: Did you see jurors going into the courtroom?

A: Yes.

Q: Periodically.

A: Yes.

Q: And that's as jury selection was unfolding?

A: Yes.

Q: And there were jurors outside in the hallway because they couldn't all fit in the courtroom. Do you remember that?

A: I couldn't tell who was for the jury and who was—because I didn't know what was going on in the room, so I don't know who the [68] people were.

Q: Right. Do you remember a lot of people being out in the hallway?

A: Correct.

Q: Did you ever see a sign on the courtroom door saying: Courtroom closed. Do not enter. Or anything to that effect?

A: I don't recall that.

Q: Okay. To your knowledge was the courtroom locked or were the people who were going into the courtroom just walking through the doors?

A: No. The courtroom was unlocked, but the clerk officer was standing at the door.

Q: Okay. Now when you say "clerk officer," we want to be clear. Are you talking about a clerk or are you talking about the court officer in the white shirt?

A: The court officer in the white shirt.

Q: So there was someone opening and closing the door.

A: No. You could open it; but when you open it, he would be there— [69]

Q: Okay.

A: —or she would be there. You would have to say. But they knew me.

Q: So when you—when you say "they knew me," you're talking about the court officers?

A: Yes.

Q: Okay. And when you say you could open the door, you're just talking about—if you were one of those prospective jurors, you could just turn the handle and open the door and go in if you were allowed to do so?

A: I don't know whether you turn a handle or just pull the door, but you could open the door.

Q: Okay. Now ma'am, how long had you known Major Dunigan prior to 2003? For how many years, months/years?

A: Prior? I don't know.

Q: Approximately.

A: A guess, say thirteen.

Q: Okay. Thirteen. So—

A: Thirteen years.

Q: So since about 1990?

A: Yes. [70]

Q: Okay.

A: Approximately. It was a long time.

Q: 2003 there was an incident that took place involving your son, Kentel?

A: Correct.

Q: And then that was about August of—August into September of 2003, then the following year in June 2004—you had another son, Kassine?

A: Correct.

Q: And he wound up being the victim of a homicide in June of 2004?

A: That's correct.

Q: That case was also handled by the Suffolk County District Attorney's Office?

A: That's correct.

Q: And there was a person charged in Kassine's homicide by the name of Rakeem Young (phonetic)?

A: That's correct.

Q: And that case was actually prosecuted in this very same courthouse just a couple of months after Kentel's trial had ended, the summer of 2006? [71]

A: Say that again. I'm sorry.

Q: The trial involving the person who killed Kentel Weaver, that person Rakeem Young, that trial started just a couple of months after Kentel's trial?

A: Probably. Close to it.

Q: Close to it. And in the course of that trial, did you ever have any contact with a victim-witness advocate from our office?

A: Yes.

Q: Do you remember who that person was?

A: I want to—for Kassime's case?

Q: Yes.

A: I want to say—I think a Mariella.

Q: Maricella Ramirez?

A: Correct.

Q: Okay. Now did you have any contact with Maricella Ramirez regarding Kentel's case?

A: No. I don't—not to my knowledge.

Q: Okay. And fair to say that she wasn't present because the roles were changed a little bit—

A: Right.

Q: —or a lot, I guess, in Kentel's [72] case.

A: Correct.

Q: And you knew what the role of the victim-witness advocate was based on your involvement in Kassine's case, correct?

A: Correct.

Q: Okay. Fair to say that you didn't have any contact with the victim-witness advocate from our office on Kentel's case? I hope I'm not confusing you, ma'am.

A: No. I—I believe I understood it, and I don't recall.

Q: Okay. So—because—

A: Oh. No.

Q: Okay.

A: Did I have a—

Q: Yes.

A: No.

Q: You understand because Kentel was actually the—

A: Right.

Q: —defendant—

A: Right.

Q: —in that case. [73]

A: Right.

Q: So those types of services would not be available to you in that particular type of case, Kentel's case.

A: Okay.

A: So what I'm asking is this. Is it fair to say that you didn't have any contact with a victim-witness advocate regarding Kentel's case during jury selection?

A: For Kentel's case. It's fair to say I don't recall for sure.

Q: Okay. So if I were to suggest to you, ma'am, could you be mistaken it wasn't a court officer, could it have been a victim-witness advocate who told you you couldn't come into the courtroom?

A: That was—no.

Q: No.

A: It was a court officer.

Q: It was a court officer.

A: Thank you.

Q: And that happened on one day or both days, Mrs. Weaver?

A: Both days. [74]

Q: Okay. Did it happen more than once on both days?

A: Yes.

Q: Do you have a recollection of the jury selection process starting late in the day on Friday, April 7th, 2006?

A: Starting late?

Q: Later in the day.

A: No.

Q: Did you see Mr. Davis after court recessed for the day on that Friday?

A: Yes.

Q: Did you tell him that you had not been allowed into the courtroom?

A: Yes.

Q: You told him.

A: Yes.

Q: Okay. So you made—were you with Major Dunigan when you made him aware of that?

A: I can't recall if she was beside me.

Q: And fair to say that when you made him aware of that, you also would have discussed things like how far you got in the jury selection process, possibly how it was [75] progressing? Were you curious?

A: Yes. But at that time you don't know enough about it.

Q: Understood. But you knew enough just to ask or tell Mr. Davis, your son's attorney, that you hadn't been allowed into the courtroom.

A: Yes, because he said we could come to court that day.

Q: Okay. Did you discuss prior to the case starting him filing some type of paper or him making a request of the Court that you be allowed to be in the courtroom during the trial? Did you discuss that prior to the case starting?

A: No.

Q: Let me ask it this way, back up a little bit, ma'am. Do you remember Judge Hines? Does she look familiar to you?

A: Yes.

Q: Okay. Do you remember testifying in a hearing some months prior, it may have been even a year prior to the trial, at a motion hearing that had to do with Kentel's [76] statements?

A: Yes.

Q: Okay. And did—Mr. Davis, leading up to the trial, did he let you know that you would also likely be testifying at the trial? That you would be a witness at the trial?

A: That I may be a witness at the trial.

Q: At the trial. Okay. Did you tell him that you wanted to be present during the trial?

A: Yes.

Q: Did you tell him that you wanted to be present during all phases of the trial?

A: Yes.

Q: Including selection of the jury?

A: Yes.

Q: And you made sure that you were in the courthouse on that day?

A: Yes.

Q: Okay. At the end of the day, did you have an opportunity, if however brief, to speak to your son at the conclusion of the proceedings on Friday, April 7th, that first day of jury selection?

A: No. [77]

Q: You didn't have a chance to speak to him?

A: Not to my knowledge.

Q: Okay. And when jury selection continued on Monday, April 10th, do you recall if you were in the same—outside the same courtroom or had the locations moved?

A: I'm sorry. Can you repeat that, please.

Q: When you came back to court on Monday, April 10th, did you come back to the same courtroom or did you have to go to a different courtroom? Had the proceedings moved?

A: I'm not for sure. I know that—I think one time it had switched. I'm not for sure though.

Q: Okay. Fair to say that a lot of the floors in this building resemble each other?

A: Correct.

Q: Okay. Did you see a lot of jurors outside the courtroom on Monday? Did you see a big crowd outside the courtroom on Monday again?

A: I saw a lot of people. [78]

Q: A lot of people. Okay. And it wasn't for you to distinguish whether they were there as potential jurors or they had other business in the building that day.

A: Right.

Q: You were just there.

A: Yes.

Q: Okay. Now I'll ask the same series of questions. Fair to say that on that day you saw the same thing taking place, prospective jurors going into the courtroom?

A: Yes.

Q: Okay. To your knowledge the door was not locked?

A: To the knowledge—to my knowledge? When?

Q: When the jurors were going in, prospective jurors were going in.

A: No.

Q: Okay. You saw the same court official or court officer?

A: I can't say if it was the same one, but I seen him.

Q: A court officer. [79]

A: Correct.

Q: Fine. Fair to say, ma'am, that you didn't see any sign posted: Do not enter. Public out. Courtroom closed.

A: That's correct.

Q: That's correct. You didn't see that.

A: No.

Q: Now did the same thing happen on Monday? Were you told by a court officer that you couldn't go into the courtroom until the jury was picked?

A: Yes.

Q: Now jury selection took a big part of that day. Do you remember breaking—the Court taking a recess for lunch?

A: On which day?

Q: On Monday now.

A: Yes.

Q: Okay. And again, did you have the same conversation that you had with Mr. Davis on Friday? Did you let him know that again you hadn't been allowed into the courtroom?

A: No. I just—no.

Q: Not on that day. [80]

A: No.

Q: Okay. But you did on Friday.

A: Right. We spoke each day.

Q: Okay. And as far as you speaking, was that for purposes of him keeping you abreast or keeping you—letting you know what was going on as far as how everything was progressing inside the courtroom?

A: I would think so.

Q: You remember two members of the Boston Police Department who at one point came to your house, Sergeant Detective O'Leary? Do you remember him?

A: Correct, yes.

Q: And do you remember Detective Paul McLaughlin?

A: Is it fair to say that neither of them had a conversation with you either on Friday or Monday telling you you couldn't go into the courtroom?

A: Correct.

Q: Now you prepared an affidavit. It's dated March 6th, 2011, and you wound up providing that affidavit to Ms. Greenberg? [81]

A: Correct.

Q: And did she wind up contacting you some time in 2011, talking to you about the case?

A: No.

Q: The appeal.

A: The appeal?

Q: Yes.

A: No.

Q: At what—

A: She told—

Q: Well, let me ask you this, ma'am. Just showing you this affidavit, as best you can for the Court just describe, how did this come into existence?

A: This here was because she had said that she needed an affidavit for saying if I was able to go into the courtroom.

Q: Okay. Now some five years later you remember the trial happening in 2006?

A: Yes.

Q: Now that's—

A: I don't know if that's the correct year. I'm sorry. [82]

Q: For purposes of this hearing assuming 2006, some years later she reached out to you.

A: Yes.

Q: And the affidavit, you dated it March 6th of 2011.

A: Okay.

Q: And who first brought up the topic of not being allowed into the courtroom? Was that you or was that Ms. Greenberg who brought up that subject?

A: It was myself.

Q: And you made her aware of that.

A: Yes.

Q: Thank you very much for your time, ma'am.

THE COURT: Any further questions?

MS. GREENBERG: No, Judge. Thank you.

THE COURT: Mrs. Weaver, thank you very much.

THE WITNESS: Thank you.

THE COURT: Is that it, Ms. Greenberg?

MS. GREENBERG: That's it for me, [83] Judge. I think I can save some time by stipulating to some of the Commonwealth's witnesses. It's clear there's no—we don't need to call those two police officers because the witness testified it wasn't them, agreed it wasn't them. I'm not going to argue that it was. I think there are three court officers on his list that—they have stated the same. They don't remember that they were at this trial. So the statements they gave to the police officers, I stipulate to that. And as to the victim-witness assistant person, I don't think we need him either. He's going to say I didn't tell them, and that's fine. I can stipulate to that. So there is nothing in the pile of people that they want to call. I can agree to all of it, and I would like to argue.

THE COURT: Well, let me hear from Mr. Pappas because I have to respect what he wants to do.

MR. PAPPAS: I think we would like to make our record with the witnesses, Your Honor. [84]

THE COURT: Okay. That's fine.

MR. PAPPAS: Given the nature of the testimony.

THE COURT: That's fine.

MR. PAPPAS: I think they will be fairly brief witnesses.

THE COURT: Okay.

MR. PAPPAS: Michael Glennon.

MICHAEL GLENNON, SWORN.

THE COURT: Good afternoon.

THE WITNESS: Good afternoon.

MR. PAPPAS: May I inquire, Your Honor?

THE COURT: You may.

DIRECT EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, sir.

A: Good afternoon.

Q: Can you please just state your name and spell your full name for the record.

A: Michael Glennon, G-L-E-N-N-O-N.

Q: And you work for the Suffolk County [85] District Attorney's Office?

A: I do.

Q: In what position?

A: I am both a victim-witness advocate as well as the Director of Community Based Juvenile Justice.

Q: And how long have you been working as a victim-witness advocate in the district attorney's office in Suffolk County?

A: Twenty-four years.

Q: And during those twenty-four years, have you had occasion to work on homicide cases?

A: I have.

Q: Approximately how many?

A: About fifty.

Q: And just very generally, could you describe for the Court your duties and responsibilities as a victim-witness advocate.

A: As a victim-witness advocate I am the conduit to victim and witnesses of crime. Under Chapter 258B, they have the right to be informed about the court proceedings, as well as help with intervention in the trauma of the [86] violent crimes that brought them to the—brought into the criminal justice system, and following along with them the proceedings in the court.

Q: And typically, would you have any involvement in a homicide case if a person were to be charged, or persons were to be charged, with the defendant's families—

A: No.

Q: —and provide them services?

A: No, I would not.

Q: Okay. I want to direct your attention back to 2003, at some point were you the assigned victim-witness advocate regarding he homicide of Jermaine Rutger that occurred on August 10th of 2003?

A: I became the assigned advocate in that case at some point in time during the case. I was not originally. I believe a colleague of mine was, who then left the office and I became involved.

Q: Okay. And at the time the case went to trial in 2006, you were the assigned advocate? [87]

A: I was.

Q: Fair to say that during the pendency of the case until it went to trial you had contact with

Jermaine Rutger's—frequent contact with Jermaine Rutger's grandparents?

A: I did. Yes, his adopted parents.

Q: Moses Rutger and Rosa Rutger?

A: Yes.

Q: And also some contact, if not frequently, some limited contacted with Jermain Rutger's uncle, the Reverend William Dickerson?

A: Yes.

Q: Okay. During the pendency of the case, did you become aware at some point that Kentel Weaver was the individual charged for the death of Jermaine Rutger?

A: Yes.

Q: And again, during the pendency of the case, did you become aware of the brother of Kentel Weaver, an individual by the name of Kessine Weaver, who was murdered in June of 2004?

A: I was aware that his brother had been murdered. [88]

Q: And a person by the name of Rakeem Young was indicted for that homicide?

A: Yes.

Q: You weren't the advocate assigned to that particular case, correct?

A: No.

Q: Directing your attention to the trial of Kentel Weaver, directing you back to April 7th, 2006, a Friday, and then Monday, April 10th, 2006, in

this courthouse, are you aware that the trial started on those two days?

A: I am.

Q: And that was in this building?

A: It was.

Q: And do you remember who the defendant's attorney was for that trial?

A: It was Mr. Davis.

Q: And do you recall on Friday, April 7th, and then on Monday, April 10th, jury selection took place in two different courtrooms in this building?

A: Yes.

Q: One being on the tenth floor in courtroom 1015, and the other being in [89] courtroom 914 on the ninth floor?

A: Correct. Yes.

Q: And were you at the courthouse for those days?

A: I was.

Q: And fair to say that you were aware back then who Iris Weaver was?

A: I'm not sure when I became aware of who Mrs. Weaver was, whether it was either during the trial itself or it was prior to the trial actually starting.

Q: Okay. Did you—were you aware that she was with someone by the name of Susan Dunigan, a person who wore a—for lack of a better term a uniform?

A: Yes. I remember her being at the trial with Major Dunigan.

Q: And referred to herself as Major Dunigan?

A: Yes.

Q: Okay. And did you see them outside in the hallway today prior to testifying?

A: I did.

Q: And those are the same two individuals [90] that you recall as being Iris Weaver, Kentel's mother, and Major Dunigan?

A: Yes.

Q: Okay. Did you have any contact with either of those two individuals leading up to and including the two days of jury selection?

A: I don't remember seeing them at that point in time.

Q: Okay. Not whether you saw them. Did you have any contact with them?

A: I did not have any contact with them.

Q: Okay. So is it fair to say if you didn't have any contact with them on the two days of jury selection, Friday, April 7th, and Monday, April 10th, you wouldn't have been in a position to tell them that they could not go into the courtroom during jury selection?

A: No.

Q: And did you yourself—were you yourself able to get into the courtroom on either of those days?

A: I was monitoring the courtrooms on those days as the jury selection process happened to see when it was going to end so [91] when the trial would begin.

Q: And fair to say that part of your monitoring the jury selection process would have—be having periodic contact with me, whether it might be at the end of the day on Friday, a quick recess in the morning on Monday, or lunch Monday afternoon to get updates on how the jury selection process was unfolding?

A: Correct. Those are the times I would have tried to come by the courtroom when I knew you would have been available to talk to let me know how it's going.

Q: And why would you be interested in that type of information for purposes of doing your job?

A: To know when openings were going to be so that I could alert the family members, Rosa and Moses, to be in the courtroom to hear openings.

Q: And potentially other witnesses when they would need to be at the courthouse for the beginning of the trial?

A: Correct. [92]

Q: Okay. With respect to those two courtrooms, Mr. Glennon, 1015 and 914, at any point do you have a recollection of the courtroom doors being closed or locked during jury selection?

A: No. I don't have any.

Q: Do you have recollection of seeing sign on the door saying either: Do not enter. Public Not Allowed. Anything to that effect?

A: I never saw any signs like that.

Q: You've been doing this for twenty-four years?

A: Correct.

Q: And you're aware that the Trial Court, especially this particular courthouse, the Suffolk County Courthouse, is staffed with court officers?

A: Yes.

Q: You know who they are?

A: I know many of them.

Q: Did any court officer ever approach you during the two days of jury selection for this trial telling you that you couldn't go [93] into the courtroom?

A: No. No court officer did that.

Q: Thank you very much.

MR. PAPPAS: I don't have anything further.

THE COURT: Thank you. Any questions?

MS. GREENBERG: Yes, Judge.

CROSS-EXAMINATION BY MS. GREENBERG:

Q: I don't know that you remembered. Were you with Rosa and Moses on the sixth floor of the courthouse for this jury selection?

A: I'm not sure if—that's oftentimes a place that we would have people. That's where the grand jury is, and that's where we have rooms to keep people. So that's oftentimes a place where we would have people wait.

Q: Were Rosa and Moses in the courthouse on those two days?

A: I don't know if they were here on Friday. I know that they were here on Monday.

Q: And why would they be on the wrong floor? I mean, how did they get to the sixth [94] floor? Were you in contact with them on that day?

A: I was in contact with them. I don't know that it would be the wrong floor. The sixth floor is where the district attorney's office has offices and the grand jury, and that's oftentimes where we have people wait.

Q: Do you know why they weren't in the courtroom when the trial was being conducted?

A: They were there waiting for the trial to begin, opening statements.

Q: Well, were they waiting for jury selection to be over?

A: Yes.

Q: Thank you.

MS. GREENBERG: Nothing further.

MR. PAPPAS: Just briefly.

REDIRECT EXAMINATION BY MR. PAPPAS:

Q: Did they ever make a request, either Rosa Rutger or Moses Rutger,—you're aware they are both deceased now?

A: I actually think Rosa is.

Q: Okay. Well, let me ask you this. Did [95] they ever make a request to be present in the courtroom during jury selection?

A: No, they did not.

Q: And there's a family waiting room equipped with furniture that's arguably a little bit more comfortable than the wooden benches outside all the trial sessions?

A: That's correct.

Q: And that's an accommodation that's afforded to many, many victims and witnesses in the cases that are prosecuted in this building?

A: That's correct. It's actually in the victim's bill of rights.

Q: Thank you.

MR. PAPPAS: I don't have anything further.

THE COURT: Thank you very much.

THE WITNESS: Thank you.

THE COURT: You may step down. I'm dealing with the domino effect of Friday. I had a hearing that I was supposed to be doing this afternoon. I put it off to four o'clock. So I can be here until four o'clock, but after that I have to go. [96]

MR. PAPPAS: Can we try to squeeze one more witness in, Your Honor?

THE COURT: Sure.

MR. PAPPAS: I think—

THE COURT: No, no. I mean, it's upstairs.

MR. PAPPAS: That's all I have.

THE COURT: It's prisoner cases, but you know, I had to shuffle things to accommodate you this afternoon.

MR. PAPPAS: And this is the last witness I have.

THE COURT: That's fine. I just wanted you to know that I have to leave at four.

MR. PAPPAS: Sergeant O'Leary.

TIMOTHY O'LEARY, SWORN.

THE COURT: Good afternoon.

THE WITNESS: Good afternoon.

MR. PAPPAS: May I inquire, Your Honor?

THE COURT: You may. [97]

DIRECT EXAMINATION BY MR. PAPPAS:

Q: Good afternoon, sir. Could you please introduce yourself to the Court and spell your last name.

A: Yes, sir. My name is Thomas J. O'Leary, O-'-L-E-A-R-Y.

Q: And you work for the Boston Police Department?

A: Yes, sir.

Q: And your current rank is that of sergeant detective?

A: Yes, it is, sir.

Q: How long have you held that rank for?

A: Since 1993.

Q: Directing your attention back to 2003, were you assigned to the Homicide Unit back then?

A: Yes, I was.

Q: And did you work at least with one detective by the name of Paul McLaughlin?

A: Yes.

Q: He worked under your supervision back in 2003?

A: He did. [98]

Q: He has also since been promoted to sergeant detective, and he is still in the Homicide Unit?

A: He has.

Q: Are you still in the Homicide Unit, sir?

A: No. I'm the supervisor of night detectives at Area B-2 in Roxbury.

Q: And how long have you held that position, sir?

A: For the past six years.

Q: Okay. Directing your attention back to August 10th of 2003, were you aware of a homicide involving Jermaine Rutger?

A: Yes.

Q: That occurred on August 10th?

A: Yes.

Q: On Wendover Street in Roxbury?

A: Yes.

Q: You wound up becoming the primary investigator for that homicide?

A: Yes, I did.

Q: And you were the investigator through the investigation that you conducted, the grand [99] jury investigation, all pretrial motions, including motions to suppress and ultimately the trial in April of 2006?

A: That's correct.

Q: Okay. During the course of your investigation, did you come to know Kentel Weaver's mother, Iris Weaver?

A: Yes, I did.

Q: And in fact you conducted an interview of the defendant, Kentel Weaver, in her house?

A: Yes, we did.

Q: During your investigation.

A: Yes, we did.

Q: And certain statements that were made both at the house and later at District 2 became the subject of a motion to suppress?

A: Yes, they did.

Q: That was litigated at the courthouse down on Devonshire Street?

A: Yes, it was.

Q: Before Her Honor, Justice Hines?

A: Absolutely.

Q: And during the course of the time that you were involved in the case, from August 2003 [100] at least up until that point, the motion to suppress, did you become aware of some other family members in Kentel Weaver's home?

A: Yes.

Q: Would that include a brother that he had, Kassine Weaver?

A: Yes.

Q: Another individual who lived there by the name of Paul Smith?

A: Yes.

Q: Certainly you knew Iris Weaver.

A: Correct.

Q: And did you become aware of an individual during the pendency of this case by the name of Major Susan Dunigan?

A: Yes.

Q: And to your knowledge based on your role as the investigator in this case, she wasn't any type of percipient witness. She provided pastoral support to Iris Weaver?

A: That is correct.

Q: But you knew who she was.

A: Yes.

Q: Okay. Now during the pendency of [101] Kentel Weaver's case, did you become aware sometime in June of 2004 that his brother, Kassine Weaver, was the victim of a homicide? Was a homicide victim himself?

A: Yes.

Q: And an individual by the name Rakeem Young was actually prosecuted for that murder?

A: Yes.

Q: Now directing your attention to April 7th, 2006, as it relates to Kentel Weaver, does that date have any significance to you?

A: Yes.

Q: And what significance does it have, sir?

A: That's the day we started jury selection in this building.

Q: And it actually started—jury selection started later in the day on that Friday, April 7th, 2006?

A: Yes, it did.

Q: Did it start on the tenth floor?

A: Yes, it did.

Q: And that would have been courtroom 1015? [102]

A: Correct.

Q: Did jury selection conclude in that courtroom?

A: It did not.

Q: Did it move when proceedings resumed on Monday, April 10th, 2006?

A: It did, down one floor.

Q: Right underneath, courtroom 914?

A: Yes, sir.

Q: Now you've been a member of the Boston Police Department for how long, sir?

A: Since 1985.

Q: And fair to say that you have had more than one tour in the Homicide Unit than the one you referenced that was taking place in 2003?

A: Correct.

Q: Approximately how many homicide prosecutions, cases that actual went to trial, have you been involved in, sir?

A: I would say probably at least one hundred.

Q: Okay. And have you—as part of those prosecutions, as part of being an investigator, and as part of being involved in [103] those cases, did you have the opportunity to—at least from a peripheral standpoint the opportunity to observe the jury selection process?

A: Yes.

Q: On many occasions?

A: Yes.

Q: And would that include both at this courthouse, the Suffolk County Courthouse, and when the court's business was being conducted at the old federal courthouse on Devonshire Street for a number of years?

A: Yes.

Q: Now jury selection started in this particular case you said on April 7th, 2006?

A: It did.

Q: You said in courtroom 1015?

A: Correct.

Q: Were you at the courthouse on that day?

A: I was.

Q: And were you in contact with me? You knew I was the prosecutor assigned from day one on this case? [104]

A: Yes.

Q: And typically, what is your function as far as the first day of jury selection? What are your responsibilities?

A: Well, even leading up to the first day, I would say a week/two weeks/three weeks leading up to it, you're pretty much connected to the—connected at the hip with the prosecutor getting ready for trial, prepping witnesses and locating witnesses. On the first day of trial, which would be the first day of jury selection, ideally one detective from the squad would be assigned to the floor to work hand in hand with the district attorney, to keep a calendar, if you will, to get ready for the view, just to be aware of when the—when the jury was just

about ready to be selected, when the view was going to be set up, and dates and times as to when to start shepearding witnesses and police officers into the court.

Q: And fair to say that the view has a lot of working parts as far as you having to coordinate an escort for a bus so that the [105] jurors can be escorted to the location of where the incident occurred so that they can move about freely on the city streets without fear of being interrupted, and you're responsible for coordinating that?

A: Yes.

Q: And Friday, April 7th, 2006, there were a number of pretrial motions that were litigated?

A: Yes, there were.

Q: And is it fair to say that one of the motions that you knew was going to be litigated on that day was the motion for a view?

A: Correct.

Q: And you would have to coordinate setting up that view as soon as Friday, April 7th, 2006?

A: Perhaps.

Q: Okay. As far as jury selection itself goes, are you aware that jury selection actually commenced on that Friday, April 7th, 2006?

A: Yes, it did.

Q: Fair to say it was later in the day? [106]

A: Yes, it was.

Q: And typically on a single-defendant case, in your experience approximately how many jurors would be brought up to impanel a jury of sixteen?

A: I would say over—at least one hundred or so, over a hundred.

Q: In that ball park?

A: Correct.

Q: Okay. And you've been—you have a level of familiarity with the courtrooms in this building, sir?

A: Absolutely.

Q: You familiarity with courtroom 1015 and courtroom 914?

A: Yes, sir.

Q: Directing your attention to the galleries of those particular courtrooms, are they approximately the same size?

A: Yes.

Q: And about how many people roughly could fit in the galleries of those two courtrooms?

A: I would say fifty/sixty probably. [107]

Q: Okay. And if the number were—if we were to go on the low end, fifty people approximately fitting in the gallery of that courtroom, could another potential sixteen be seated in the area of the jury box?

A: Yes.

Q: So that would give you roughly in the neighborhood of sixty-six people being accommodated for jury selection.

A: Well, in the courtroom and—

Q: In the courtroom.

A: Yes.

Q: Okay. Were you present when the jurors were brought up on Friday, April 7th?

A: Yes.

Q: And after the—or prior to that point, did you have any contact with Major Dunigan, Iris Weaver or Paul Smith that they couldn't go into the courtroom for jury selection?

A: None whatsoever.

Q: Okay. Do you have a recollection if Detective Paul McLaughlin was there on that Friday? [108]

A: I don't recall.

Q: Okay.

A: Paul was here. I can't say was he with me when the jurors were brought up, but he was my partner.

Q: Okay.

A: I would be the—for that case I was the--in the courthouse, logistics guy. Paul would be the street guy waiting for my orders to get ready for the trial.

Q: Okay. So fair to say—just so we can have a range, fair to say that somewhere in the neighborhood of eighty to one hundred jurors, in that ball park, were brought up for jury selection?

A: Absolutely.

Q: And do you have a memory of not all the jurors or—do you have a memory of all the jurors not being able to fit into courtroom 1015?

A: Yes.

Q: And where were they as a result of not being able to fit into courtroom 1015?

A: They would be—my recollection is [109] that—I think they were in another courtroom, and then there would be some out in the hallway as well.

Q: Okay. And do you have a recollection of ever seeing a sign on the courtroom doors on that Friday of the courtroom being closed?

A: Never. No.

Q: Were you aware of the courtroom ever being locked during jury selection?

A: I'm not aware of it, no.

Q: Did anyone ever bring to your attention, either anyone from the district attorney's office or a court officer employed by the Trial Court, that either Mrs. Weaver or Major Dunigan would not be allowed into the courtroom during jury selection?

A: No.

Q: And is it your memory that jury selection started later in the day on Friday, April 7th?

A: Yes.

Q: And approximately is it your recollection that one juror was selected?

A: That's correct. [110]

Q: And that the jury selection process for all intents and purposes had just begun on Friday, April 7th?

A: Correct.

Q: Were the same number of jurors approximately brought back to the courthouse on Monday, April 10th, 2006?

A: Yes, they were.

Q: And this time to a different courtroom?

A: Correct. Downstairs, down one floor, on the ninth floor.

Q: Courtroom 914?

A: Correct.

Q: And was that approximately the same size as courtroom 1015?

A: It is.

Q: So it had approximately the same seating arrangements in that approximately fifty or so jurors, prospective jurors, could sit in the gallery and another sixteen in the actual jury box?

A: Correct.

Q: And was it the same arrangements on [111] that particular day, that certain jurors, prospective jurors, had to wait outside the courtroom?

A: Yes.

Q: Did you ever have any contact with Major Dunigan or Iris Weaver saying that they couldn't go into the courtroom?

A: None.

Q: Were you aware of the courtroom being locked at any time during jury selection?

A: No, sir.

Q: On Friday and Monday did you see prospective jurors going into the courtroom?

A: Yes.

Q: Did you ever see a sign on any—on the courtroom door on Monday, courtroom number 914, that the courtroom was locked?

A: Never

Q: A Do Not Enter sign, No Admittance, anything to that effect?

A: Never.

Q: Did you see both Iris Weaver and Major Dunigan both on the first and second day of jury selection? [112]

A: I believe so.

Q: Okay. Did you acknowledge Mrs. Weaver?

A: I always do.

Q: Okay. Like you did today?

A: Yes.

Q: And like you did last Friday.

A: Yes.

Q: Have you seen her in the community since 2003?

A: Many times.

Q: Okay. And you acknowledge her each and every time?

A: I do.

Q: Did you ever say to them—did you ever have any communication with her or Major Dunigan at any point during jury selection that they couldn't go into the courtroom?

A: None.

MR. PAPPAS: That's all I have.

THE COURT: Thank you.

Any questions, counsel?

MS. GREENBERG: None, Judge.

THE COURT: Okay. [113] Sergeant Detective, thank you very much.

THE WITNESS: Pleasure to see you again, Judge.

THE COURT: Thank you. You have time. Do you want to have—

MR. PAPPAS: That's all we have for today.

THE COURT: Okay.

MR. PAPPAS: What we would like to do if it's agreeable to the Court we would like to confer whether there's some type of stipulation we could enter into regarding the last—the last four—who would be the last four witnesses, Your Honor.

THE COURT: Okay.

MR. PAPPAS: And might be able to do that, and perhaps we can set this up for either the conclusion of the presentation of the Commonwealth's witnesses and/or argument for that day. If that's agreeable?

THE COURT: Sure. I set aside Monday and Friday afternoons - I don't schedule my own motions - so that I can deal with matters like [114] this. So tell

me what Monday or Friday you would like to finish this up. Yes, Ms. Greenberg.

MS. GREENBERG: I can come this Friday, Judge.

THE COURT: This Friday I can't do it. We have a court conference this Friday.

MS. GREENBERG: I can come next Friday.

THE COURT: Okay. Next Friday is—

MS. GREENBERG: Judge, I apologize. That Friday is a Jewish holiday. I can't come.

THE COURT: Okay. Friday, the 13th.

MR. PAPPAS: Friday, the 13th, or Monday, the Monday—

THE COURT: That's a holiday I think. Monday, the 16th, isn't it?

THE CLERK: It is.

MR. PAPPAS: Your Honor, can I suggest a week from today, Monday, the 2nd?

THE COURT: Monday, the 2nd.

MS. GREENBERG: I have—I'm in this courthouse in front of Judge Brady.

THE COURT: Okay. [115]

MS. GREENBERG: But the Monday after the 2nd, Monday, the 9th?

THE COURT: The 9th, I think so. See, I'm not in my courtroom, and I didn't bring my calendar with me. Okay. Two o'clock Monday, the 9th, is that what you would like?

MS. GREENBERG: Yes.

MR. PAPPAS: I think we will be available, Your Honor.

THE COURT: Okay. So let me just write that down, and I will let you know if there's a problem with that date. Okay. Now that you've heard all the evidence, you might want to consider giving me your point of view on the case, how the law applies to what we've heard through the witnesses, so arguments. So if you want to do that on the 9th in addition to presenting any other witnesses that you have, that's fine.

MS. GREENBERG: Judge, if we can agree, I have four witnesses statements for the Commonwealth. I would be happy to put those in if we're done with the evidence.

THE COURT: Well, I'll leave that to [116] you all to talk about. Okay. Thank you all very much.

MR. PAPPAS: Thank you, Your Honor.

MR. PAPPAS: Thank you, Judge.

(Whereupon, court was adjourned.)

Commonwealth *vs.* Kentel Myrone Weaver

SUCR2003-11293

SUPERIOR COURT

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

The defendant, Kentel Myrone Weaver ("Kentel"), was convicted after jury trial on April 26, 2006, on indictments charging first degree murder in violation of G.L. c. 265, § 1 (Count 1), and possession of a firearm without a license in violation of G.L. c. 269, § 10(a) (Count 2). The trial judge (Neel, J.), now retired, sentenced the defendant to a mandatory life term at MCI Cedar Junction on the murder conviction and a concurrent term of one year to one year and a day on the firearms conviction.[1]

On June 1, 2011, the defendant filed his motion for new trial alleging ineffective assistance of counsel relating to trial counsel's treatment of the defendant's confession, and claiming a violation of his Sixth Amendment right to a public trial. The motion was bifurcated by agreement of the parties. Judge Geraldine Hines conducted an evidentiary hearing on the public trial issue in March, 2012, and issued a memorandum of decision on February 22, 2013, ruling

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[1] It is undisputed that the defendant, a juvenile at the time of the murder, is entitled to the benefit of a corrected mittimus to reflect that his life sentence under G.L. c. 265, § 2 carries with it the opportunity for parole consideration after fifteen years. See *Diatchenko v. District Attorney for Suffolk County*, 466 Mass. 655 (2013), and *Commonwealth v. Brown*, 466 Mass. 676 (2013).

that although the courtroom was improperly closed to family members during jury empanelment, the defendant is not entitled to a new trial because there was no objection to the closure, resulting in a waiver of the claim.[2]

In January, 2014, the defendant supplemented his motion for new trial, submitting to the court affidavits of Professor Alan Hirsch and Psychologist Frank DiCataldo (Pleading No. 139). The defendant also requested an evidentiary hearing. On April 30, 2014, the Commonwealth filed an opposition to the motion (Pleading No. 144). After preliminary hearings relating to discovery requests and the like, the Court held evidentiary hearings on April 29, 2014, July 16, 2014, and August 22, 2014. Thereafter, the parties were given until September 26, 2014, to file supplemental memoranda (the Commonwealth did, the defendant did not) and the matter was taken under advisement. For the reasons set forth below, the defendant's motion is DENIED.

BACKGROUND

The defendant, age sixteen at the time, surrendered to Boston Police detectives on August 27, 2003, telling the police in the presence of his mother, "I shot Germaine Rucker."[3] His statement related to the

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[2] Judge Hines was prescient in her ruling. In two cases since her decision, the Supreme Judicial Court has adopted her precise reasoning, finding that the failure of counsel to object to a courtroom closure at the time of trial results in a procedural waiver of the claim. See *Commonwealth v. Alebord*, 461 Mass. 106, 112 (2014); *Commonwealth v. Morganti*, 461 Mass. 96, 102 (2014).

[3] The facts are drawn from the detailed Memorandum of Decision on the defendant's motion to suppress statements.

August 10, 2003 shooting death of fifteen-year-old Germaine Rucker on Wendover Street in Boston. Rucker was shot in the head and abdomen and succumbed to his wounds.

A subsequent police investigation led to a witness who reported seeing a black male wearing a baseball cap run from the scene just after the shooting occurred. During his flight, the male lost his hat. The police recovered a blue Detroit Tigers baseball cap with distinctive markings (airbrushed letter "D") on each side of the Detriot Tigers logo. The detectives later learned that the defendant had been arrested on a drug crime on July 26, 2003, and according to police records, he had been wearing a Detroit Tigers baseball cap.

The police initially focused on the defendant's older brother, Cassim Weaver, as possibly connected to the shooting. On August 22, 2003, detectives brought Cassim to the police station and questioned him about the shooting. While at the station, Cassim called his mother, Iris Weaver, and told her that the police had taken him to the station to question him about Germaine Rucker's shooting. Iris Weaver, distraught about this news, went to the police station in search of her son, and was informed that he was not there. Cassim, having satisfied the detectives that he was not involved in the shooting, had been driven home by a police officer.

The detectives then focused on the defendant. Sergeant Detective Thomas O'Leary went to the Weaver home and spoke with Iris. He apologized for the way Cassim had been brought to the police station and indicated that he wanted to speak with her other son, Kentel. Ms. Weaver stated that Kentel was at camp but would be returning home on Sunday, August

24. Ms. Weaver agreed that they would meet with Sergeant Detective O'Leary on Monday, August 25.

Around 8:30 p.m. on August 25, Sergeant Detective O'Leary and his partner, Detective Paul McLaughlin, went to the defendant's home where they informed the defendant and his mother that they wanted to question Kentel about the Rucker shooting. They were not told, however, that the defendant was suspected of being involved in the crime. Concerned that the detectives could take Kentel to the station for questioning as they had done with Cassim, she consented to an interview in her home.

Before any questions were asked, the detectives produced a juvenile waiver form that contained printed Miranda warnings, stating that such warnings were routine. After reviewing each of the warnings with the defendant and his mother, and providing them an opportunity to consult in private, the detectives obtained a signed waiver (by mother and son) and commenced questioning the defendant. The questioning took place over the course of approximately three hours at the dining room table. Ms. Weaver was either present at the table or, from time to time, in the adjoining kitchen area preparing dinner. In summary terms, the defendant denied being involved in or present at the time of the shooting. The detectives questioned the defendant about a leg injury he sustained, asking him if maybe he had fallen off a bicycle on the night of the shooting. The defendant denied that, telling the police that whoever said that was lying. Instead, Kentel claimed that he injured his leg while playing basketball and, after reviewing a calendar, stated that the injury occurred on August 12 (two days after the shooting).

The police also questioned the defendant about his baseball cap. Kentel acknowledged that he wore a blue Detroit Tigers baseball cap and that he had taken it to a downtown Boston store which airbrushed the letter "D" on either side of the Tigers' logo. When asked where the cap was, Kentel stated that it was either stolen or lost on the same night he injured himself playing basketball. The defendant denied any involvement in the events surrounding Rucker's shooting and the police told him they believed that he was present on Wendover Street and was involved in the shooting. Sergeant Detective O'Leary stated that he needed to know the truth and would continue with the investigation. Before leaving the house, O'Leary spoke with Iris, urging her to have a "heart to heart talk" with her son and try to obtain the truth.

After the detectives left, Iris Weaver began her own questioning of her son, concerned that he had not been truthful with the police and especially because his baseball cap had been found at the scene of the shooting. Separate and apart from Sergeant Detective O'Leary's request, Iris had her own desire to clarify her son's involvement in a very serious crime, wanting "to have some peace with this thing." She questioned Kentel for an hour, telling him that she did not believe his answers. She sat up most of the night thinking about the situation.[4]

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[4] Differing versions of the events occurring at the defendant's home on August 25 and 26 were presented at the suppression hearing. In their September 26, 2014 Opposition to Defendant's Motion for New Trial (Pleading No. 152) the Commonwealth recites testimony of Iris Weaver and Paul Smith to support its claim that Iris' questioning of her son was neither as heated nor intense as the defendant now suggests. This Court draws its facts

Iris went to work the next morning but was still focused on the shooting incident and Kentel's possible involvement. She left work and arrived home at approximately 10:00 a.m. She questioned Kentel until, after about an hour, she stopped because he had given her a headache. A half hour later, she resumed her conversation with Kentel, continuing on an off through the afternoon. She introduced God into the discussion, telling the defendant that there were no secrets from God and that for the sake of his soul he had to confess. Iris prayed aloud, at one point joined by the defendant's sister, Treyana. Her repeated entreaties bore fruit, the defendant ultimately acknowledging that he had been in the area when the shooting took place. When asked if he did it or knew who did, Kentel put his head down, a gesture that Iris interpreted as a "yes." She continued to implore the defendant to tell the truth, telling him that it was necessary for the good of his soul.

Sometime around 4:00 p.m., Iris Weaver called Sergeant Detective O'Leary to tell him about the day's events. She left a message and received a return phone call about four hours later. She informed O'Leary that she was bringing Kentel to the police station. When asked if that meant Kentel was involved in the shooting, Iris responded, "yes."

At some point, the defendant told his mother he did not want to go to the police station. She continued to implore him to confess as a necessary means of being right with God and saving his soul. According to the motion judge, "In the end, he succumbed to his mother's demands that he confess for the good of his

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from those found by the motion judge in her memorandum of decision.

soul and turn himself in to the police." Memorandum of Decision, p. 4. Iris then outlined a plan: they would go to the police station where Kentel would say, "I shot Germaine Rucker," but that the defendant would say nothing more until an attorney had been appointed.

The family held a prayer session into the night and then went to the nearby station, praying aloud as they went. Arriving at the Area B-2 station at approximately 12:30 a.m., the family stood in a circle, praying for Kentel, who was crying at the time. Sergeant Detective O'Leary and Detective McLaughlin arrived about 15 minutes later. Iris Weaver approached them and stated that Kentel had something to say, after which she expected that he would be arrested and that she wanted him to have an attorney before any questioning occurred. O'Leary, assuming that Kentel would make an incriminating statement, advised Iris that he would not take any statement until Kentel was represented by counsel. He produced a juvenile Miranda form and began reciting Miranda rights to the defendant, who then interrupted by saying, "I shot Germaine Rucker." O'Leary then placed the defendant under arrest.

The defendant was ultimately indicted by a Suffolk County grand jury. Willie J. Davis, an experienced criminal defense lawyer, represented the defendant. On February 11, 2004, Davis filed a motion to suppress the defendant's August 25 and 27, 2003 statements. He asserted a variety of grounds, including that Iris Weaver did not qualify as an "interested adult," that she was an agent of the police in obtaining the August 27 statement, and that Kentel's statements were involuntary and coerced. The motion was supported by affidavits of the defendant and his mother. In her

affidavit, Iris Weaver described the events that had occurred on the afternoon of August 27:

> During the afternoon questioning, Kentel admitted to being in the area of the shooting. During this questioning I was yelling and screaming at him. I said to him that I thought he knew more than he was telling me. I said to him that I had not slept since the police were here. I asked him if he had been at the scene at the time of the shooting. He responded that he had. I then asked him, "do you know who the shooter is, or were you the shooter." He put his head down. I took this to mean that the answer was "yes."
>
> After speaking with Detective O'Leary, I told Kentel that he needed to tell the police what he knew that he would have no kind of life if he did not tell what he knew. At that time Kentel still had not said that he did it.
>
> I took Kentel to the police station around 10:30 p.m. Paul Smith, my boyfriend, and Treyana, my daughter, were with me. At the station, I told Detective O'Leary that Kentel had something to say.
>
> Kentel has always been an obedient child. I believe and therefore aver that any admission he made was coerced by me.

Affidavit of Iris Weaver.

The defendant's affidavit followed a similar thread, the defendant averring that he was raised to obey his mother and did not understand that he could disobey his mother by invoking his right not to speak with the police .

An evidentiary hearing commenced on the motion on July 22, 2004 and continued on August 5, 2004. Further submissions were filed by the parties, and arguments on the motion were heard on November 29, 2004, before Judge Hines, then sitting in Middlesex Superior Court. The judge issued a comprehensive decision in September, 2005, detailing (as recounted above) the interactions between the defendant and his mother, her motivations for insisting that Kentel admit his actions, and the defendant's reluctant acquiescence to her demands. The judge ruled that the defendant's statements were lawfully acquired and that the defendant's will was not overborne by his mother's entreaties such that the statements would be involuntary under the law. A request for interlocutory review of the ruling was denied by a single justice of the Supreme Judicial Court. The defendant was subsequently convicted after a jury trial in which evidence of the defendant's statement was presented.

MOTION FOR A NEW TRIAL

Represented by new counsel on appeal, the defendant filed his motion for new trial asserting, inter alia, that Attorney Davis was ineffective for (1) failing to consult an expert regarding the defendant's susceptibility to psychological coercion; and (2) failing to present expert evidence on psychological coercion at trial.[5] The motion for new trial was supported by

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[5] The defendant also claimed that Attorney Davis was ineffective because he failed to present expert testimony on a juvenile's capacity to premeditate, and failing to argue expert neuropsychological and psychiatric evidence on the issue of sentencing. Counsel did not pursue either of these claims at the evidentiary hearing or in argument to the Court and therefore, they are waived.

affidavits from Attorney Davis, Iris Weaver, and Dr. Frank DiCataldo. The Court conducted an evidentiary hearing on the motion on various dates in April, July, and August, 2014.

Attorney Davis testified that he has been a criminal defense lawyer for over forty years and has handled over 100 murder trials at the trial and appellate level. He has been qualified by the Committee for Public Counsel Services for assignment as murder counsel and served as chairman of the Committee for Public Counsel Services for over ten years. He has been a member of the Massachusetts Association of Criminal Defense Lawyers since that organization was founded and has lectured and participated in numerous continuing education programs for Massachusetts Continuing Legal Education.

Davis represented Kentel throughout the case. Because the defendant was fifteen and sixteen at the time, Davis' primary contact was Iris Weaver. He spent a lot of time discussing the circumstances surrounding the defendant's statements with Iris and formulated the defense that the police used Iris as their agent to induce Kentel to admit his involvement in the homicide. He moved to suppress the defendant's August 27, 2003 statement to the police on that ground and further, based on the claim that the defendant was impermissibly pressured by his mother to confess to the police and, in doing that, she failed to act as an interested adult for her son.

Attorney Davis described his approach to preparing a defense, first learning the facts of the case and then, starting from scratch, researching the law as it relates to the issues presented. In doing so he became knowledgeable about the state of the law as of the time

of his representation. At the time Davis litigated his motion to suppress and tried the case, he was not aware of any appellate decisions permitting expert testimony on claimed coerced or false confessions. Similarly he was not aware of any rulings by judges on the Superior Court permitting such evidence. To the contrary, he had defended one case, *Commonwealth v. Charles Monteiro*, SUCR1995-11982, where the trial judge had denied the request of the co-defendant to present expert testimony on coerced and false confessions, ruling that the proffered testimony failed to satisfy the standards for reliable expert testimony.[6] That ruling was affirmed on appeal. *Commonwealth v. Robinson*, 449 Mass. 1, 5-7 (2007). According to Davis, there was no strategic reason not to consult with or present an expert on psychological coercion and, given the nature of the defense claim that Iris had served as a police agent and pressured Kentel to admit his involvement in the shooting, it would not have hurt the case to do so.[7]

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[6] The co-defendant, Anthony Robinson, was tried six months prior to Davis' client, the cases having been severed. Attorney Davis ordered the trial transcripts and acknowledged that he would have been aware of the court decision at the time of the Monteiro trial.

[7] By the same token, Attorney Davis candidly admitted that he may have researched the admissibility of expert testimony on coerced and false confessions and determined that there was no case law permitting such evidence. His method of practice is to know a case (and applicable law) thoroughly at the time he is handling it but generally not retain the information later. Thus, at the time of the evidentiary hearing he simply had no recollection of the extent of his legal research into the issue.

Criminal defense attorney John Cunha was offered by the defendant as an expert witness in criminal trial practice. Attorney Cunha, a 1976 graduate of Boston College Law School, has been a criminal defense attorney for all but two years of his legal career. Like Davis, Cunha has been qualified to accept appointments from the Committee for Public Counsel Services in murder (and all other criminal) cases. He has been a clinical instructor in trial practice at Suffolk University Law School and Harvard Law School. He is a member of the Massachusetts Association of Criminal Defense Lawyers and served as its president four years ago.

In response to the hypothetical question, whether in the case of a sixteen-year-old claiming he was psychologically coerced into making a statement it would be deficient for counsel not to consult an appropriate expert, Attorney Cunha opined that it would be ineffective because a lawyer's duty is to investigate all of the circumstances surrounding a statement obtained by the police.

According to Cunha, a lawyer's duty is heightened where, as in the instant case, the whole case is built around the defendant's admission. Notably, Cunha's opinion was not based on the defendant's age or scientific research relating to adolescent brain development.

The basis for Attorney Cunha's opinion was explored in cross examination. He acknowledged that he had no detailed knowledge of the instant case and did not review a trial file, nor did he interview Davis, the defendant, or the defendant's mother. He was not familiar with appellate law relating to the admissibility of expert psychological evidence during the time period from 2004-2006. Rather, Cunha stated

that his opinion was a generalized statement of "best practices," although he acknowledged that the Committee for Public Counsel Services does not require that appointed counsel engage psychological experts in all cases. Moreover, on cross examination, Cunha was questioned about several cases, in Middlesex, Suffolk, and Plymouth Superior Courts, where he either did not engage a psychological expert on issues relating to the validity of a defendant's waiver, or retained but did not call the expert at trial.

The final defense witness was Frank DiCataldo, a forensic psychologist with a Ph.D. in clinical psychology from St. Louis University. Dr. DiCataldo has served as an expert witness in juvenile, district, and superior courts across the Commonwealth and has provided opinions on the voluntariness of statements in juvenile and adult cases, opining that most were voluntary but in a minority of cases opining that mental illness, drugs, or coercive factors rendered a particular defendant's statement involuntary .

DiCataldo did not find any evidence that the defendant suffered from any significant cognitive limitations and did not detect any signs of mental illness. He assumed the defendant understood and likely voluntarily waived *Miranda* warnings given by the police, although he questioned whether Iris Weaver fully understood the warnings (based on her testimony in court). DiCataldo testified that in the last five years, there has been a proliferation in research regarding adolescent brain development which show that a juvenile may be more susceptible to coercive or suggestible influences than adults. As of 2003, DiCataldo had been retained to evaluate such cases and used psychological tests to assess an adolescent's susceptibility. He was also familiar with literature

showing that children are more susceptible to psychological coercion and, as compared with adults, more likely to make a false or unreliable statement when under pressure.

With regard to the instant case, DiCataldo administered two psychological tests to the defendant (Psychological Assessment Inventory "PAI" and Neo Five Factor Inventory) which showed Kentel to be a youth with high anxiety, poor coping skills, subject to impulse decisionmaking when stressed, and somewhat compliant with authority figures. Coupled with an interview of the defendant and an understanding of the defendant's family dynamics, DiCataldo opined that by virtue of a protracted interrogation by his mother, the defendant's admissions were not the product of his own free will or rational intellect.

On cross examination, DiCataldo admitted some limitations to the bases for his opinion. He had never evaluated a voluntariness claim where the asserted coercive force was a parent (or mother in particular). He acknowledged that this was the first time he formed an opinion on the voluntariness of a statement ten years after it had been made, and that neither of the tests that he administered to the defendant were specifically focused on juveniles (in 2007, the P AI was adapted for adolescents). Similarly, DiCataldo acknowledged that there is no specific psychological tests to determine whether a person's will has been overborne.

DISCUSSION

This Court may grant a new trial "at any time if it appears that justice may not have been done." See Mass. R. Crim. P. 30(b); *Commonwealth v. Johnson*,

435 Mass. 113, 123 (2001). The standard under Mass. R. Crim. P. 30(b) is intentionally broad, and the disposition of the motion for a new trial is left to the discretion of the motion judge. *Commonwealth v. Schand*, 420 Mass. 783, 787 (1995); *Commonwealth v. Moore*, 408 Mass. 117, 125 (1990). This Court is "to apply the standard set forth in Rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." *Commonwealth v. Wheeler*, 52 Mass. App. Ct. 631,635-636 (2001) (citation omitted).

In order to prevail on an ineffective assistance of counsel claim under art. 12 of the Massachusetts Declaration of Rights, the defendant must establish that his attorney demonstrated "serious incompetency, inefficiency, or inattention" falling measurably below that of an "ordinary, fallible lawyer" and that this deprived the defendant of an "otherwise available, substantial ground of defence." See *Commonwealth v. Phinney*, 446 Mass. 155, 162 (2006); *Breese v. Commonwealth*, 415 Mass. 249, 252 (1993); *Commonwealth v. Saferian*, 366 Mass. 89, 96-97 (1974).[8] See also *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977) (noting that defendant must show that better work might have accomplished something material for defense). If the test for effective assistance of counsel under the Massachusetts

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[8] The standard of review applied by this court is different from that to be applied by the Supreme Judicial Court on direct appellate review. Under G.L. c. 278. § 33E, a standard more favorable to the defendant applies: "whether there was an error in the course of the trial and, if there was, whether that error was likely to have influenced the jury's conclusion." *Commonwealth v. Wright*, 411 Mass. 678, 682 (1992) .

Declaration of Rights is met, the requirements of the Federal Constitution are necessarily satisfied as well. See *Commonwealth v. Montanez*, 410 Mass. 290, 295 n.7 (1991); *Commonwealth v. Fuller*, 394 Mass. 251, 256 (1985).

Effective assistance of counsel is not measured by trial counsel's willingness to indulge every available procedure no matter how futile, and failing to pursue a futile tactic does not amount to constitutional ineffectiveness. *Commonwealth v. Brady*, 380 Mass. 44, 56 (1980); *Commonwealth v. Vieux*, 41 Mass. App. Ct. 526, 527 (1996). Similarly, the reasonableness of an attorney's strategic decisions (including whether to call an expert witness) is to be evaluated according to the state of the law at the time, and not in hindsight based on later changes in the law. *Commonwealth v. Walker*, 443 Mass. 867, 871-876 (2005); *Commonwealth v. Mahar*, 442 Mass. 11, 17-19 (2004) ("We do not require attorneys to foretell the future: the attorney's advice was reasonable, and it did not become incompetent because a subsequent judicial opinion made clear an aspect of the offense that was previously less certain").[9]

The defendant claims that Attorney Davis was ineffective because he (1) failed to consult an expert in the field of coerced confessions; and (2) failed to present expert testimony at the motion to suppress

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[9] The same principle defeats the defendant's argument that the value of Dr. DiCataldo's testimony is demonstrated by the fact that the trial jury sent the judge a note during deliberations asking for a definition of "psychological coercion." The reasonableness of an attorney's judgment is not necessarily measured by events that develop later in the life of the case.

hearing or at trial on the issue of coerced confessions.

It is not at all clear why Davis would have been ineffective for failing to consult with an expert witness, separate and apart from the claimed failure to present expert testimony. Ineffective assistance has been found where trial counsel failed to investigate obvious potential defenses, most notably in cases involving mental illness. See *Commonwealth v. Roberio*, 428 Mass. 278, 279-282 (1998) (counsel's failure to investigate mental health defense constituted ineffective assistance where counsel was on notice of mental heath treatment); *Commonwealth v. Doucette*, 391 Mass. 443, 458-459 (1984) ("Failure to investigate an insanity defense would fall below the level of competence demanded of attorneys, if facts known to, or accessible to, trial counsel raised a reasonable doubt as to the defendant's mental condition"); *Commonwealth v. Alvarez*, 433 Mass. 93, 101-104 (2000) (ineffective assistance where counsel failed to investigate prior medical history that supported claim of insanity where (1) defendant was reported to be a poor historian of her medical history, and (2) due to the technical and complex nature of modern medicine, it normally takes expert assistance to understand and appreciate medical records). The common thread in such instances is that an ordinary attorney is generally not well suited to making psychiatric or psychological assessments about mental illness without expert consultation, and when the circumstances of a case suggest it, an attorney's duty is to conduct an appropriate investigation.

By contrast, in *Commonwealth v. Spray*, 467 Mass. 456 (2014}, the Supreme Judicial Court rejected

a claim that counsel was ineffective for failing to investigate the psychological effects of past methamphetamine abuse where there was no information suggesting that the defendant was suffering from a psychotic episode at the time of the crime and where, at the time of trial, the effects of methamphetamine abuse were little known in Massachusetts. Notwithstanding that such an investigation might have yielded a more powerful defense, "counsel was not under a constitutional duty to undertake a supplemental investigation." *Id.* at 476.

In the instant case, although there is no dispute that Attorney Davis did not consult a psychological expert, there is no evidence demonstrating that his failure to do so was a lapse rather than a reasoned decision. If the latter, then his decision not to consult an expert will not be considered as ineffective unless it was "manifestly unreasonable when made." *Commonwealth v. Frank*, 433 Mass. 185, 190 (2001), quoting *Commonwealth v. Coonan*, 428 Mass. 823, 827 (1999), quoting *Commonwealth v. Martin*, 427 Mass. 816, 822 (1998). Davis characterized his approach to the handling of criminal cases as "starting from scratch," which involved learning the facts of the case and then systematically researching the law as it related to the issues raised by the evidence. In this way, the trial strategy would be based on the most current law. Davis candidly acknowledged that upon the conclusion of the case, he would not retain the information in his memory. Thus, Davis testified that while he has no present memory on the point, he may well have researched the issue of the admissibility of expert testimony on coerced confessions at the time and determined that there was no case law admitting such expert testimony at the time of the defendant's suppression hearing.

Notably, the admissibility of expert testimony on psychological coercion was first addressed in *Commonwealth v. Robinson*, 449 Mass. 1, 6-7 (2007), where the court noted that, "the subject of psychological manipulation of a defendant and its relation to false confessions presents a serious issue. Competent scientific evidence that satisfies the Lanigan standard may well be useful to a fact finder in this area, but the evidence here fell far short of the standards governing the admissibility of scientific testimony." 449 Mass. at 7. Significantly, Attorney Davis represented Robinson's codefendant, Charles Monteiro, and would have been aware that the trial judge in the Robinson case had denied a defense request to admit expert testimony by Professor Saul Kassim on the issue of police coercion in interrogations based on a ruling that Kassim's proffered testimony did not satisfy the standards for the admissibility of expert testimony, and that the subject matter was not beyond the common knowledge and experience of the jury and therefore not the proper subject of expert testimony. Consistent with Mr. Davis' practice of thoroughly knowing his case at the time but forgetting the intricacies later, he had no memory of the Monteiro case when he testified in July, 2015, although he acknowledged that he would have been familiar with the severed co-defendant's case at the time.

Given his methodical approach to preparing a defense, I find it more likely than not that Davis was aware of the absence of Massachusetts case law permitting expert testimony on the psychology of coerced and false confessions, and did not consult an expert because it would not have added value to the defense. The defendant has not shown that this decision was manifestly unreasonable, or that the ordinary fallible attorney would have done otherwise.

The failure of counsel to pursue a course of action that has minimal chance of success does not constitute ineffective assistance. See *Commonwealth v. Conceicao*, 388 Mass. 255, 264 (1983); *Commonwealth v. Bart B.*, 424 Mass. 911, 915 (1997) (same).

The defendant has also failed to satisfy the prejudice prong of a *Saferian* analysis. Unless the expert consultation and testimony had been presented at trial, the defendant will necessarily fail in his burden of showing that it might have accomplished something material for the defense; i.e., that it would have made a difference. This presumes that Dr. DiCataldo would have been permitted to testify as an expert witness and to offer an opinion on a child's susceptibility to parental coercion generally, or Kentel's susceptibility to coercion by his mother.

Section 702 of the Massachusetts Guide to Evidence governs the admission of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if
>
> (a) the testimony is based upon sufficient facts or data,
>
> (b) the testimony is the product of reliable principles and methods, and
>
> (c) the witness has applied the principles and methods reliably to the facts of the case.

Mass. G. Evid. § 702 (2014) .

The Commonwealth correctly cites to the deficiencies in Dr. DiCataldo's basis for forming his opinion in its September 26, 2014, Opposition (Pleading No. 152) at pages 35-38. DiCataldo's understanding of the case was based solely on a version of events provided by the defendant and his mother. His understanding of the defendant's psychological characteristics and cognitive abilities had a two-fold basis: an assessment of the results of two general psychological assessment tests administered ten years after the events at issue; and information from the defendant and his mother. Dr. DiCataldo mistakenly believed that Iris conducted a prolonged six-hour interrogation of her son on August 26, 2003, during which she yelled, cried, and conducted prayer sessions with other family members. The facts he relied on were substantially different from those presented at the defendant's 2004 motion to suppress hearing and those found as true by Judge Hines. Moreover, Dr. DiCataldo utilized a methodology of his own creation in forming an opinion on whether the defendant's statement to the police was voluntary. He did so because he was not aware of any peer-reviewed or generally accepted methodology within the psychological community that would apply to the circumstances here. Thus, as the Commonwealth points out, DiCataldo's opinion was largely subjective and failed to satisfy the foundational requirement of Mass. G. Evid. § 702(b).

Equally problematic is whether expert testimony would ultimately have been admissible on the issue of whether parents may have a coercive effect on their children or, by contrast, whether the parent-child dynamic is so generally familiar to a fact finder that it is not properly the subject of expert testimony. See *Commonwealth v. Bly*, 448 Mass. 473, 496 (2007). See

also Mass. G. Evid. § 702. Dr. DiCataldo testified that children are generally more susceptible to pressure than adults (and therefore more likely to be coerced) based on a power differential between an adult in a position of authority and a child. DiCataldo referenced research relating to a child's susceptibility to coercion during a police interrogation as a basis for this opinion. He admitted to being unaware of any similar research regarding the coercive influence that a parent might present.

The notion that a child is likely to be influenced by a parent is hardly a matter outside of the common understanding of the average juror. By the same token, the fact that a parent may exert pressure on their child is hardly a novel proposition. Parents routinely instruct, and at times harangue, their children in daily life activities, whether they involve homework or household chores, or in matters of morality and religion. It is quintessentially the function of a parent to nurture, raise, and guide their child into maturity, and the manner in which a parent performs this duty is generally not considered coercive. Reasonably considered, the psychological influences of a parent on their child are categorically different from those of other authority figures (including police). Consequently, DiCataldo's reliance on scientific research involving the impact of psychologically coercive or manipulative techniques by police to obtain a statement do not provide a basis for his opinion that in this case, Kentel was coerced by his mother's conduct.

Dr. DiCataldo's testimony is significant in one particular; he found no evidence of any significant cognitive limitation or developmental deficiency or impairment that would have rendered the defendant as

more susceptible to parental pressure than would be the case with any adolescent. Likewise, there was no evidence that the defendant's relationship with his mother, or the manner in which she raised or interacted with her children, rendered Kentel more susceptible to parental demands or instructions. The evidence shows that the defendant was a fairly typical adolescent, one of three children living under his mother's roof. There is nothing before the court suggesting that Kentel had any particular or unique cognitive or personality characteristics, or that his relationship with his mother was in some way abusive or abnormal, that would have made expert testimony necessary to aid the jury in understanding the fact issues.

Assessed as a whole, it is unlikely that any judge presiding over the defendant's motion to suppress in 2004, or the trial in early 2006, would have found that DiCataldo's proffered testimony met the foundational requirements of Mass. G. Evid. § 702 so as to permit expert testimony on the issue of parental psychological coercion. Absent that testimony, Attorney Davis' failure, either to consult an expert or attempt to present expert testimony, could not have prejudiced the defendant's case. Consequently, his motion for new trial based on ineffective assistance of counsel must fail.

ORDER

So much of the defendant's motion for new trial based on ineffective assistance of counsel is DENIED.

COURT AND BRIEFS

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No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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QUESTION PRESENTED

Whether a defendant who demonstrates that his lawyer's deficient performance resulted in structural error must show actual prejudice to obtain a new trial under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

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JURISDICTION

The final judgment of the Supreme Judicial Court of Massachusetts (SJC) was entered on July 20, 2016. The petition for a writ of certiorari was filed on August 18, 2016 and granted on January 13, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" and "have the Assistance of Counsel for his defence."

INTRODUCTION

When petitioner's mother arrived at the courtroom early in the morning on the first day of the criminal proceedings against her son, she found the doors closed. She, her minister, and every other member of the public waited in the hallway for the next two days, praying, while the jury that would ultimately convict her son was selected in secret.

As this Court held in *Presley* v. *Georgia*, 558 U.S. 209 (2010) (per curiam), courtroom closures of this kind are clear and unequivocal violations of the Sixth Amendment right to a public trial. But defense counsel failed to object to this unconstitutional closure—not based on a strategic calculation but because he was simply ignorant of the applicable law.

The Supreme Judicial Court of Massachusetts agreed that petitioner's right to a public trial had been violated and agreed further that defense counsel's failure to object to the closure was objectively unreasonable. It nevertheless denied petitioner relief under *Strickland* v. *Washington*, 466 U.S. 668 (1984), because petitioner conceded that he could not prove what this Court has said cannot be proven: that he suffered "actual prejudice" as a result of the complete exclusion of the public from the courtroom.

That is a perverse result. If defense counsel had objected to the violation of petitioner's public-trial right, and the trial court had still failed to open the courtroom, there is no doubt that petitioner would have been entitled to an automatic reversal and remand for a new trial. But because defense counsel incompetently failed to object—an even more troubling path to the exact same outcome—the SJC ignored the resulting structural defect and refused to grant petitioner relief. That's like saying two wrongs make a right.

There is no support in this Court's precedents for such an unfair result. The lower court's decision is inconsistent with the reasoning that underlies *Strickland*'s two-pronged test, imposes on defendants a burden that this Court has already rejected as impossible to satisfy, undermines the integrity of the criminal justice system, and leads to disturbing and unjust outcomes. The judgment below should be reversed and remanded with instructions to grant petitioner a new trial.

STATEMENT

A. Legal background

1. Trial errors and structural errors

This Court's cases have "divided constitutional errors into two classes": trial errors and structural errors. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

Trial errors are discrete errors that "occur[] during presentation of the case to the jury." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 307-308 (1991)). They include, among other things, the admission of evidence obtained in violation of the Fourth Amendment (*Chambers* v. *Maroney*, 399 U.S. 42 (1970)), a prosecutor's comment on the defendant's silence in violation of the Fifth Amendment (*Chapman* v. *California*, 386 U.S. 18 (1967)), and a restriction on a defendant's right to cross-examine a witness in violation of the Sixth Amendment (*Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986)). See *Fulminante*, 499 U.S. at 306-307 (collecting examples).

Trial errors are ordinarily isolated, and analyzing "their effect on the factfinding process at trial" is not especially difficult. *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993) (quoting *Van Arsdall*, 475 U.S. at 681). Such errors may "be quantitatively assessed in the context of other evidence presented in order to determine" whether the error affected the outcome. *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 308). Thus trial errors are generally understood to be "amenable to harmless-error analysis" and will not support the grant of a new trial on direct appeal unless the defendant can show that the violation "contribute[d] to the verdict obtained." *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24).

Structural defects are different in two ways. First, a structural error is not "simply an error in the trial process itself" but instead "affect[s] the framework within which the trial proceeds." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309-310). Structural errors thus affect the fundamental fairness of the trial: Without the basic protections of structural rights, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair" when it is the product of a structurally defective trial. *Fulminante*, 499 U.S. at 310 (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). "Errors of this type" are, in other words, "intrinsically harmful" and require "automatic reversal without regard to their effect" on the outcome of the trial. *Neder v. United States*, 527 U.S. 1, 7 (1999) (parenthetical omitted).

Second, structural defects "defy analysis by 'harmless-error' standards" as a practical matter. *Fulminante*, 499 U.S. at 309. Structural errors are "not amenable to harmless-error review" (*Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986)) because the "precise effects" of such errors are "unmeasurable," "unquantifiable," and "indeterminate," (*Sullivan*, 508 U.S. at 281-282) and thus "cannot be ascertained" (*Vasquez*, 474 U.S. at 263). Measuring the harm inflicted by structural errors on the parties—to say nothing of the criminal justice system and society at large—is simply a "practical impossibility." *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (quoting *State* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980)).

Structural errors include, among others, "the total deprivation of the right to counsel at trial," the presence of a presiding judge who is "not impartial,"

the denial of the right to self-representation, "unlawful exclusion of members of the defendant's race from a grand jury," and a violation of the right to a public trial. *Fulminante*, 499 U.S. at 309-310. The consequences of such errors are presumed as a matter of law to be prejudicial, and so they require "automatic reversal." *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993).

2. The right to a public trial

One structural guarantee—the one at issue in this case—is the right to a public trial. Open courtrooms are essential to "the proper functioning of a trial." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 569 (1980). They give "assurance that the proceedings were conducted fairly to all concerned," and "discourage perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Ibid.* Public trials thus "ensur[e] that judge and prosecutor carry out their duties responsibly" and "encourage[] witnesses to come forward." *Waller*, 467 U.S. at 46. "[A] criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair" when it is the product of a closed proceeding. *Fulminante*, 499 U.S. at 310 (quoting *Rose*, 478 U.S. at 577-578).

The public-trial right applies to all substantive stages of pretrial and trial proceedings. *Presley*, 558 U.S. at 213-214. There accordingly is no question that "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors." *Id.* at 213.

The denial of the public-trial right is a quintessential structural error, affecting the framework in which the trial proceeds. The practical consequences of

such errors are impossible to determine; there is no way to be sure what different questions would have been asked, what different witnesses would have come forward, what different answers would have been given, or what different rulings would have been handed down if the public had been present. Because a closure of the courtroom infects the trial with unfairness, and because proving the consequences of a closure is a "practical impossibility," prejudice is presumed as a matter of law. *Waller*, 467 U.S. at 49 & n.9. Accord, *e.g.*, *Fulminante*, 499 U.S. at 310.

3. The right to assistance of counsel

Among the other enumerated rights intended by the Framers "to protect the fundamental right to a fair trial" is the "right to counsel." *Strickland*, 466 U.S. at 684. "[T]he right to counsel is the right to the *effective* assistance of counsel."*Id.* at 686 (emphasis added) (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970)). Thus criminal defendants are entitled by the Sixth Amendment to "a reasonably competent attorney, whose advice is within the range of competence demanded of attorneys in criminal cases." *United States* v. *Cronic*, 466 U.S. 648, 655 (1984) (quoting *McMann*, 397 U.S. at 770-771). It follows that a lawyer may deprive his or her client of the Sixth Amendment right to counsel "by failing to render 'adequate legal assistance'" in a discrete way. *Strickland*, 466 U.S. at 686 (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 344 (1980)). The error must be "so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment" with respect to the error. *Id.* at 687.

Not every attorney error rises to the level of a Sixth Amendment violation, however; the Constitution promises "*effective* (not mistake-free) representation."

Gonzalez-Lopez, 548 U.S. at 147. Thus, the Court in *Strickland* defined "the standards by which to judge" a claim of "actual ineffective assistance of counsel." 466 U.S. at 684. The defendant generally must establish not only that his "counsel's representation fell below an objective standard of reasonableness" but also that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

The second prong of this test (the so-called prejudice prong) is a consequence of the "strong presumption of reliability" that this Court "normally appl[ies] * * * to judicial proceedings." *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000) (citing *Strickland*, 466 U.S. at 696). In most cases, for the defendant to establish that the trial was unfair, he must "overcome" the "presumption of reliability" by proving actual prejudice. *Ibid.*

But the presumption of reliability does not always apply. When the nature of the Sixth Amendment violation "makes the adversary process itself presumptively *un*reliable," there is no contrary presumption of reliability for the defendant to overcome, and thus "[n]o specific showing of prejudice [is] required." *Cronic*, 466 U.S. at 659 (emphasis added). Violations of this magnitude are known as *Cronic* errors. A "complete denial of counsel" is the "[m]ost obvious" *Cronic* error, in which the presumption of reliability is absent. *Ibid.* Because a total denial of counsel "so 'affects the framework within which the trial proceeds' * * * courts may not even ask whether the error harmed the defendant." *Luis* v. *United States*, 136 S. Ct. 1083, 1089 (2016) (plurality opinion). Such an error is instead "legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692.

B. Factual background

Fifteen-year-old Germaine Rucker was shot and killed. Pet. App. 1a. Petitioner, then just sixteen years old, was indicted and tried for the murder. *Ibid.*

On the first day of jury empanelment—"first thing in the morning"—petitioner's mother, Iris Weaver, arrived at the courtroom. JA26. When she arrived, she found the courtroom doors closed. *Ibid.* She waited in the hallway outside the courtroom, where her minister and friend, Salvation Army Major Susan Dunigan, met her. *Ibid.*

Potential jurors eventually began arriving and filing into the courtroom. JA27. Petitioner's mother and Ms. Dunigan asked to enter the courtroom with the prospective jurors, but a marshal denied them entry and told them to continue waiting in the hallway "[u]ntil someone told [them] to come in." *Ibid.*

No one ever did. Pet. App. 50a.

Petitioner's mother and Ms. Dunigan waited all day as the empanelment proceeded. Ms. Weaver tried once more to enter the courtroom during a break but was again denied entry. Pet. App. 49a. She did not question or ask why she could not be with her son; she instead "obey[ed] the rules," as instructed by the marshal. JA40. As the hours passed, petitioner's mother and Ms. Dunigan prayed. JA27. At the end of the first day, petitioner's mother "informed [defense counsel] that she had been refused entry" into the courtroom. Pet. App. 49a.

The next Monday morning, when petitioner's mother and Ms. Dunigan returned for the second day of voir dire, "the same process happened" all over again. JA27. Once more they were denied entry to the courtroom, and once more they waited on the benches

in the hallway as jurors filed in and out for the empanelment. JA26-27. See also Pet. App. 44a-46a.

Defense counsel failed to object to the courtroom closure. "[A]fter the morning recess" on the second day, for example, "the [prosecutor] alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom." Pet. App. 45a. He noted that one of the individuals had "testified on the grand jury," was "a trial witness['s] boyfriend," and was "seated amongst all the prospective jurors," adding that he did not "think [it was] appropriate that [the individual] be out in the hallway with any other friends or associates of the defendant." *Id.* at 45a-46a. Rather than objecting to the courtroom closure at that point, defense counsel "[e]cho[ed] that point of view" and offered to the judge: "If you want me to go out there and tell [the individual] to pick some other floor, I'd be glad to," despite that "[n]othing in the record * * * suggest[ed] any safety or jury-tampering issue" in the hallway. *Id.* at 46a.

Neither petitioner's mother, Ms. Dunigan, nor any other member of the public was at any time allowed into the courtroom during the two-day jury empanelment. Pet. App. 52a. Accord *id.* at 53a ("I find that a court officer * * * closed the courtroom to the defendant's family and other members of the public during the entirety of the empanelment.").

Petitioner was subsequently convicted of murder and unlicensed possession of a firearm. Pet. App. 1a.

C. Procedural background

1. Petitioner obtained new counsel and moved the SJC for a new trial, which at the time had jurisdiction over his then-pending direct appeal. This was the earliest opportunity and exclusive method for petition-

er to raise his public-trial claim. See Mass. Gen. Laws ch. 278, § 33E; Mass. R. App. Pro. 15(d), 19(d). Petitioner alleged that trial counsel had been ineffective for, among other things, failing to object to the closure of the courtroom. Pet. App. 2a.

2. The SJC referred the motion to the trial court (JA1, 3), which denied relief (JA2, 4). Although the trial court found counsel's failure to object to the courtroom closure had been deficient, it denied petitioner's motion because petitioner had not established actual prejudice.

The trial court first concluded that an unjustified courtroom closure had occurred. "Members of the defendant's family and all other members of the public were denied entry for the entirety of the empanelment, even after seating became available as members of the venire departed from the courtroom." Pet. App. 59a. Because there was "no indication that the courtroom was open to some limited number of spectators during the empanelment, or that any spectators were in fact present in the courtroom," there was "a full closure of the courtroom, rather than a partial closure." *Id.* at 57a. What is more, the court explained, "[t]he sole reason for the closure was the crowded condition in the courtroom." *Id.* at 53a. A closure of this sort, explained by courtroom crowding alone, could not "be justified as a valid limitation of the defendant's Sixth Amendment rights." *Id.* at 58a.

The trial judge next concluded the failure to object to the courtroom closure was deficient performance under *Strickland*'s attorney-performance standard. Any competent lawyer should know that closing a courtroom without a *Waller* hearing violates the Sixth Amendment; in this case, "defense counsel's failure to object did not result from the exercise of his tactical or

strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" and reflected "serious incompetency." Pet. App. 62a-63a. Defense counsel's performance was therefore deficient. *Ibid.*

Petitioner, for his part, was "unaware of his right to a public trial, [and] did not intentionally waive this right." Pet. App. 62a.

The trial court nevertheless denied petitioner's motion for a new trial because dictum appearing in *Commonwealth* v. *Dyer*, 955 N.E.2d 271 (Mass. 2011), "expressly declin[ed] to apply [a] 'structural error' analysis" to ineffective assistance claims involving structural errors and instead called for an actual prejudice inquiry. Pet. App. 64a. Because "[t]he defendant has not offered any evidence or legal argument establishing prejudice," the court denied the motion. *Ibid.*

3. Petitioner appealed the denial of his motion for a new trial; the appeal was consolidated with the direct appeal of his conviction. Pet. App. 2a.

The SJC affirmed. The court agreed with the trial court that there was a "full, rather than partial, closure" of the courtroom and that counsel's performance in failing to object to the closure was "not objectively reasonable." *Id.* at 39a-40a. But, in its view, when a defendant "raises [a public-trial] claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not

apply." Pet. App. 40a (quoting *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1104 (Mass. 2014)).

Because petitioner made no claim that the outcome of his trial would have been different absent the courtroom closure, the SJC affirmed the denial of relief. *Id.* at 40a-41a.

SUMMARY OF ARGUMENT

I. The legacy of open trials was inherited by the Colonies and has ever since been regarded by this Court as an essential ingredient to the fairness and reliability of criminal trials. As writers at the time of the Founding explained, public trials deter perjury and forestall misconduct of all kinds by impressing upon all of the participants in the trial the solemnity of the proceeding and the importance of their roles within it. Public trials are also critical to the appearance of justice, and thus to the public's confidence in the fairness and integrity of the criminal justice system.

Against this backdrop, the Court long ago held that denials of the public-trial right amount to structural defects in the trial mechanism, and a trial in which the guarantee of openness is violated is fundamentally unfair and inherently unreliable. The consequences of such violations are, moreover, impossible to measure, not only because one can only speculate what would have happened if the courtroom doors had remained open, but also because closed trials impose broader costs on the judicial system as a whole—costs that a prejudice inquiry is incapable of measuring.

II. The lower court's decision below, requiring petitioner to prove under *Strickland* that he was actually prejudiced by the illegal courtroom closure in this case, is inconsistent with the history and character of the public-trial right in at least two ways.

First, *Strickland* did not establish mechanical rules for their own sake. On the contrary, the prejudice prong of the *Strickland* test was adopted by this Court as a means of identifying those cases in which counsel's deficient performance rendered the proceedings unfair and unreliable. Absent a showing that the attorney error affected the outcome of the trial, there is usually no basis for saying that the error resulted in the sort of unfairness that the Sixth Amendment forbids. But on the face of it, that reasoning does not apply in cases where the attorney error results in a structural defect. Trials infected by structural errors—like the denial of a public trial—are *inherently* unfair and unreliable; no separate showing of actual prejudice is necessary to establish as much.

Second, the SJC's answer to the question presented ignores the impossibility of proving actual prejudice resulting from structural errors. Time and again, this Court has recognized that public-trial violations are structural errors, and time and again it has explained that the consequences of such violations cannot be measured. The court below disregarded all of this, holding defendants like petitioner to the burden of proving what this Court has said cannot be proved.

III. The SJC's decision below will produce intolerable results.

First, the decision below allows violations of the public-trial right to stand uncorrected, undermining the integrity of the criminal justice system. As this Court repeatedly has recognized, the public-trial right promotes confidence in the fair administration of justice and the appearance of fairness that is essential to public confidence in the justice system. The SJC's decision below is inimical to these principals; it both allows courtroom closures to stand uncorrected, risking

real damage to the public's respect for and commitment to the judgments of the judicial branch and—by focusing exclusively on the prejudice to individual defendants—ignores the intangible societal loss that follows from denials of the public-trial right.

Second, the decision below unjustly penalizes criminal defendants for the deficiencies of their lawyers. There is no denying that petitioner's public-trial right *was* denied and that his lawyer's failure to object *was* incompetent. Yet by dint of the holding below, petitioner was denied relief for each error because of the existence of the other error: The violation of his public-trial right went uncorrected because his lawyer incompetently failed to object, and his lawyer's incompetence went uncorrected because it resulted in a structural defect, as to which prejudice can't be proven. This kind of Catch-22 reasoning is inconsistent with the Sixth Amendment's promise of a fair trial.

Although the SJC cited the importance of finality as a reason for concluding otherwise, that concern does not hold up to scrutiny. As an initial matter, finality concerns are weakened in the context of unfair proceedings. And regardless, *Strickland*'s first prong will function as a critical and effective filter, ensuring that a reversal here will not undermine the system's interest in finality in any broad-based way. That is especially so because structural errors are, in any event, rare.

IV. Under these principles, petitioner is entitled to a new trial in this case. The trial court held that there was a complete closure of the courtroom for two days, covering the entire jury empanelment. No overriding interest justified the closure, which took place without a *Waller* hearing. What is more, according to the trial court, counsel's failure to object reflected, not

a strategic decision, but simple ignorance of the law. His performance was therefore objectively unreasonable. The SJC affirmed both of those holdings. No more is required for petitioner to obtain a new trial.

ARGUMENT

I. NO CRIMINAL TRIAL MAY BE REGARDED AS FUNDAMENTALLY FAIR OR RELIABLE IF IT TAKES PLACE BEHIND CLOSED DOORS

Few rights, if any, occupy a more favored position in the constitutional firmament than criminal defendants' right under the Sixth Amendment to a public trial. "For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 594 (1980). This truism "mandates a system of justice that demonstrates the fairness of the law to our citizens," and "[o]ne major function of [a] trial," held open to the public, "is to make that demonstration." *Id.* at 594-595.

1. The public-trial right has as long a history as any right provided by the Constitution. "The roots of open trials reach back to the days before the Norman Conquest," and even as the jury system evolved over the ensuing centuries, "the public character of the proceedings, including jury selection, remained unchanged." *Press-Enter. Co.* v. *Superior Court*, 464 U.S. 501, 505-506 (1984) (*Press-Enter. I*). "This legacy of open justice was inherited by the English settlers in America," and "[t]he earliest charters of colonial government expressly perpetuated the accepted practice of public trials." *Richmond Newspapers*, 448 U.S. at 590. Accord *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 425 (1979); *Press-Enter. I*, 464 U.S. at 505.

By the time the Colonies were being settled, there was more support for public trials than mere deference to tradition. The Framers' "distrust for secret trials" was a response to "the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*." *In re Oliver*, 333 U.S. 257, 268-269 (1948). "All of these institutions obviously symbolized a menace to liberty." *Id.* at 269. "In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial." *Id.* at 269-270. And "in comparison of publicity, all other checks [on such abuses] are of small account." *Id.* at 271 (quoting 1 Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)).

2. In addition to protecting against despotism, the right to a public trial reflected the Framer's judgment that openness is essential to "assur[ing] the criminal defendant a fair and accurate adjudication of guilt or innocence." *Richmond Newspapers*, 448 U.S. at 593. Thus, "in identifying the function of publicity at common law," both Hale and Blackstone "discussed the open-trial requirement not in terms of individual liberties but in terms of the effectiveness of the trial process." *Gannett*, 443 U.S. at 421.

First, "the requirement that evidence be given in open court deterred perjury, since 'a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal.'" *Gannett*, 443 U.S. at 421 (quoting 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768), and citing Matthew Hale, *The History of the Common Law of England* 343, 345 (6th ed. 1820)). Accord *Waller*, 467 U.S. at 46 (openness "discourages

perjury"). As another contemporary of the founding generation, Jeremy Bentham, put it: "the publicity of the examination or deposition operates as a check upon mendacity." Bentham 522. What is more, an open gallery may "induce unknown witnesses to come forward with relevant testimony" in the first place. *Gannett*, 443 U.S. at 382.

Second, the Framers understood that "the presence of interested spectators" keeps the participants in the proceeding "keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quoting *Gannett*, 443 U.S. at 380; in turn quoting *Oliver*, 333 U.S. at 270 n.25; in turn quoting Thomas Cooley, *Constitutional Limitations* 647 (8th ed. 1927)). Publicity thus ensures the contentiousness of prosecutors, marshals, judges, and jurors, helping to forestall the injustice that may result from indifference or undue passion. *Gannett*, 443 U.S. at 382.

These factors have particular importance to the jury empanelment process, where veniremen are often asked probing questions about their backgrounds and relationships. It is therefore fundamental that the accused has "a right to insist that the *voir dire* of the jurors be public." *Presley* v. *Georgia*, 558 U.S. 209, 213 (2010) (per curiam).

3. The public-trial right also serves recognized social interests, apart from protecting the accused's right to a fair trial. For example, it is now well understood that "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion" when a crime is committed. *Richmond Newspapers*, 448 U.S. at 571. The Court has "sometimes described [this] as [the] 'community therapeutic value'" of public trials. *Press-*

Enter. I, 464 U.S. at 508. A public demonstration "that society's responses to criminal conduct are underway" helps to ease "the natural human reactions of outrage and protest." *Richmond Newspapers*, 448 U.S. at 570. Open proceedings thus answer the "fundamental, natural yearning to see justice done." *Id.* at 571. But the "community catharsis" brought about by public trials obviously cannot occur "if justice is done in a * * * covert manner." *Ibid.*

Beyond that, public trials promote the appearance of justice, and thus the public's confidence in the criminal justice system. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enter. Co.* v. *Superior Court*, 478 U.S. 1, 13 (1986) (*Press-Enter. II*) (quoting *Richmond Newspapers*, 448 U.S. at 572). For example, "where the trial has been concealed from public view, an unexpected outcome can [lead the public to believe] that the system at best has failed and at worst has been corrupted." *Richmond Newspapers*, 448 U.S. at 571. By contrast, "the sure knowledge that *anyone* is free to attend [a criminal trial] gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. I*, 464 U.S. at 508.

Thus, the public-trial right not only serves the interests of criminal defendants, but also "promotes confidence in the fair administration of justice." *Richmond Newspapers*, 448 U.S. at 572. In these ways, "the public trial right extends beyond the accused" and protects both the rights of the public (*Presley*, 558 U.S. at 212) and "the appearance of fairness so essential to public confidence in the system" (*Press-Enter. I*, 464 U.S. at 508).

4. By the same token, measuring the practical effects of a violation of the public-trial right is, as this Court put it in *Waller*, a "practical impossibility." 467 U.S. at 49 n.9 (quoting *Connecticut* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980)). Courts thus presume prejudice from violations of the public-trial right because the error "*always*" and "*necessarily*" (*Neder* v. *United States*, 527 U.S. 1, 9 (1999)) undermines the fairness and accuracy of the proceeding.

To begin with, a simple prejudice analysis is inapt to measure the "great, though intangible, societal loss that flows" from structural errors like a denial of the public-trial right. *Waller*, 467 U.S. at 49 n.9 (quoting *People* v. *Jones*, 391 N.E.2d 1335, 1340 (N.Y. 1979)). But even with respect to the individual defendant and the fairness of the trial, inquiring how the participants in a closed proceeding would have behaved if the doors instead had been open—and then attempting to measure the impact of those differences on the ultimate outcome—would be "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150. The parties and judges alike would be left guessing whether different objections would have been raised, different rulings would have been made, different questions would have been asked, or different answers would have been given—and whether and how any of those differences might have affected the outcome.

Thus, this Court has said in the context of direct appeals under *Chapman* that prejudice from a public-trial violation must be presumed. *Waller*, 467 U.S. at 49-50. Such errors, like all structural defects, "defy analysis by harmless-error standards by affecting the entire adjudicatory framework." *Puckett* v. *United States*, 556 U.S. 129, 141 (2009) (quoting *Fulminante*,

499 U.S. at 309). Structural errors are "not amenable to harmless-error review" (*Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986)) because the "precise effects" of such errors are "unquantifiable" and "indeterminate," (*Sullivan*, 508 U.S. at 281-282) and thus "cannot be ascertained" (*Vasquez*, 474 U.S. at 263). That is assuredly true of violations of the public-trial right. *Fulminante*, 499 U.S. at 309. Prejudice is thus presumed in cases where the courtroom doors are closed in violation of the Sixth Amendment. *Waller*, 467 U.S. at 49-50.

II. WHEN DEFICIENT PERFORMANCE RESULTS IN A STRUCTURAL ERROR, THE DEFENDANT NEED NOT PROVE ACTUAL PREJUDICE TO OBTAIN RELIEF UNDER *STRICKLAND*

The decision below is inconsistent with this history and the meaning and character of the public-trial right in at least two ways. First, when counsel's incompetent performance results in an unchallenged violation of the public-trial right, the trial is rendered fundamentally unfair, and the defendant therefore has no obligation to prove actual prejudice. Second, as this Court has repeatedly held, structural errors like a closed courtroom are simply not amenable to a prejudice analysis; what matters is the nature of the error, not its source. The SJC's approach to the question presented cannot be squared with these settled rules.

A. *Strickland* does not require proof of actual prejudice when circumstances render the trial fundamentally unfair and unreliable

Because trial counsel's incompetent performance resulted in a structural error that rendered the trial fundamentally unfair, petitioner bore no burden to prove actual prejudice under the second prong of *Strickland*'s ineffective assistance test.

1. The general requirement under *Strickland* that a defendant pressing an ineffective assistance claim must establish a reasonable probability of actual prejudice (466 U.S. at 694) does not exist for its own sake. Rather, it is a reflection of the defendant's burden to overcome the "presumption of reliability" that courts ordinarily afford all "judicial proceedings." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000) (in turn quoting *Strickland*, 466 U.S. at 696)). Unless the presumption of reliability is overcome by a showing of actual prejudice, the proceeding is presumed to have been fair and its outcome accurate, and the Sixth Amendment will not have been violated. See, *e.g.*, *Gonzalez-Lopez*, 548 U.S. at 148.

Thus, the question posed by *Strickland*'s prejudice prong is "whether, *despite* the strong presumption of reliability" accorded all criminal trials, "the result of the particular proceeding is unreliable." *Strickland*, 466 U.S. at 696 (emphasis added). A defendant pressing an ineffective-assistance claim ordinarily must "overcome that presumption" by "show[ing] how specific errors of counsel undermined the reliability of the finding of guilt." *Roe*, 528 U.S. at 482 (quoting *Cronic*, 466 U.S. at 659 n. 26). "Absent some effect of [the] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658.

2. At the same time, the Court has recognized that structural errors affect the fundamental fairness of a trial: "[A] criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair" when it is the product of a structurally defective trial. *Fulminante*, 499 U.S. at 310

(quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). Because structural errors render a trial fundamentally unfair and thus "an unreliable vehicle for determining guilt or innocence" (*Rivera* v. *Illinois*, 556 U.S. 148, 160-161 (2009)), the presence of a structural error displaces the presumption of reliability with a presumption of *un*reliability. In other words, because a structural error contaminates the entire proceeding with unfairness, it "render[s] the proceeding presumptively *un*reliable," and courts "cannot accord any presumption of reliability" to the determination of guilt. *Roe*, 528 U.S. at 483-484 (emphasis added) (failure to file notice of appeal).

It follows that when deficient performance results in a structural error that necessarily renders the proceeding fundamentally unfair, a criminal defendant bears no obligation to prove actual prejudice. After all, a defendant must make "a showing of actual prejudice" only "when the proceeding in question was presumptively reliable" (*Roe*, 528 U.S. at 484); he cannot bear a burden to overcome a presumption when the presumption does not apply. Thus, prejudice must be presumed "with no further showing from the defendant * * * when the violation of the right to counsel rendered the proceeding presumptively unreliable." *Ibid.*

3. This is the rationale underlying *Cronic* errors. In *Cronic*, the Court recognized that "under [certain] circumstances the likelihood that counsel could have performed as an effective adversary [are] so remote as to [make] the trial inherently unfair." 466 U.S. at 660-661. See also *id.* at 662 (trials so infected are "insufficiently reliable to satisfy the Constitution"). Thus, in cases involving *Cronic* errors, "[n]o specific showing of prejudice [is] required" because the nature of the surrounding circumstances "makes the adversary process

itself presumptively unreliable," and "'no amount of showing of want of prejudice [can] cure'" the resulting unfairness and unreliability. *Id.* at 659-661 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)).

Examples include when counsel is burdened by an actual conflict of interest (*Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980)), when counsel is prevented from conducting a full cross-examination of key witnesses (*Davis*, 415 U.S. at 317-318), and when counsel's preparation is so hindered by circumstance as to be practically meaningless (*Powell* v. *Alabama*, 287 U.S. 45 (1932)). In all such cases, the "magnitude" of the circumstances destroys the presumption of reliability that a defendant ordinarily would bear the burden of overcoming with a showing of actual prejudice. *Cronic*, 466 U.S. at 659.[1]

4. This settled framework, affirmed time and again in this Court's precedents, resolves the question presented. When defense counsel's deficient performance results in a structural error like an unjustified courtroom closure, the trial in which the error occurs "cannot reliably serve its function." *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993) (citing *Rose*, 478 U.S. at 577). Thus, the presumption of reliability is displaced by a presumption of unfairness and unreliability, and there is no presumption that the defendant bears a

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[1] In fact, *Cronic* permits the reversal of a conviction "without [*either*] inquiring into counsel's actual performance *or* requiring the defendant to show the effect it had on the trial." *Bell* v. *Cone*, 535 U.S. 685, 695 (2002) (emphasis added). Once a defendant shows that *Cronic* applies, in other words, he bears no further obligation to demonstrate that his lawyer rendered deficient assistance in any particular respect.

burden to overcome with a showing of actual prejudice.[2]

That is the case here. "While defense counsel's failure to make a timely [objection] is the primary manifestation of incompetence" in this case, petitioner's claim is that his counsel's deficiency resulted in a "distinct" violation (*Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986)) of his public-trial right.

There is no denying that the public-trial right is one of those "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for the determination of guilt or innocence." *Gonzalez-Lopez*, 548 U.S. at 157-158 (Alito, J., dissenting). The "nexus" between "openness" and "fairness" is beyond reasonable debate. *Richmond Newspapers*, 448 U.S. at 570. As we explained *supra* (at 16-17), public trials "ensur[e] that judge and prosecutor carry out their duties responsibly" and "encourag[e] witnesses to come forward" and testify truthfully. *Waller*, 467 U.S. at 46. Indeed, the point of a secret proceeding is that no one can see what takes place—and thus no one can have any confidence that the proceeding was fair or its result reliable. Again, the Framers' insistence on the Public Trial Clause was in part a reaction to the

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[2] This conclusion does not implicate the concern expressed by Justice Thomas in his dissent from the denial of certiorari in *Bell* v. *Quintero*, 125 S. Ct. 2240 (2005). There, Justice Thomas (joined by the Chief Justice) rejected the idea that the presence of a structural error would justify *both* a presumption of prejudice *and also* "a presumption that counsel was ineffective," reasoning that "even competent counsel may fail to object" to a structural error. *Id.* at 2242. That may be true generally, but not in this case. Here, both courts below concluded that counsel's failure to object to the courtroom closure was deficient performance; thus, the question presented in the petition assumes that the first prong of the *Strickland* test is independently satisfied.

historical use of closed proceedings to impose arbitrary punishments; they viewed closed trials as a "menace to liberty." *Oliver*, 333 U.S. at 268-269.

Thus, failure to observe the public-trial guarantee is to deny due process itself, which "demands appropriate regard for the requirements of a public proceeding." *Richmond Newspapers*, 448 U.S. at 574 (quoting *Levine* v. *United States*, 362 U.S. 610, 616 (1960)). Against this background, an unjustified courtroom closure "*always*" and "*necessarily*" (*Neder*, 527 U.S. at 9) undermines the fairness of the proceeding. To conclude otherwise would be to disregard centuries of the Anglo-American legal tradition.

"From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice" (*Richmond Newspapers*, 448 U.S. at 573) and that no proceeding taking place behind closed doors can be regarded as fundamentally fair. Because no court may accord a presumption of reliability to a closed criminal proceeding (*Fulminante*, 499 U.S. at 310), petitioner bore no burden to "overcome" such a presumption with a showing of actual prejudice.

5. The SJC failed to appreciate this basic framework. It instead concluded that "[p]resuming prejudice in this context" would "ignore[] the distinct and well-established jurisprudence which governs claims of ineffective assistance of counsel," which provides that, outside the narrow *Cronic* context, "a defendant * * * must show that counsel's deficiency resulted in prejudice." *LaChance*, 17 N.E.3d at 1105. But as we have just shown, the opposite is true: this Court's "well-established jurisprudence" provides, not that

defendants must always prove actual prejudice, but that they must prove actual prejudice when the judicial proceedings being challenged are entitled to a presumption of reliability. The upshot: actual prejudice need not be shown when circumstances (such as the presence of a structural error) destroy the presumption of reliability.

The SJC's contrary view that *Strickland* inflexibly requires a showing of actual prejudice outside the narrow context of *Cronic* errors (*LaChance*, 17 N.E.3d at 1106) is precisely the sort of rigid and "mechanical" approach to ineffective assistance claims that *Strickland* itself warned against. It is "the principles" underlying *Strickland*'s two-pronged test, the Court warned, and not "mechanical rules," that "should guide the process of decision." 466 U.S. at 696. "[T]he ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," and not on rote adherence to a two-pronged test. *Ibid.* The decision below cannot be squared with that teaching.

B. The decision below is at odds with this Court's cases holding that actual prejudice from courtroom closures cannot be proved

There is yet another reason that this Court must reject the SJC's answer to the question presented: As this Court has repeatedly held, it is a practical impossibility to prove (and, indeed, even to evaluate) the actual prejudice that might flow from a violation of the public-trial right. Again, because structural errors "affect[] the entire adjudicatory framework" within which the trial proceeds, they "defy analysis by harmless-error standards." *Puckett*, 556 U.S. at 141 (quoting *Fulminante*, 499 U.S. at 309). The "precise effects" of

such errors are simply "indeterminate" and "unmeasurable." *Sullivan*, 508 U.S. at 281.

That conclusion is particularly apparent with respect to the public-trial right. When it comes to trial errors, such as the improper admission of evidence or a discrete error in the jury instructions, "the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." *Satterwhite* v. *Texas*, 486 U.S. 249, 256 (1988) (quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978)). But in the case of a closed courtroom, the evil is not in the evidence presented or the instructions given; it is instead in what the lawyers, witnesses, and judge would have done *differently* if they had not been behind closed doors. See *supra*, 16-17, 19-20.

Inquiring how the participants in a closed proceeding would have behaved if the public-trial right had not been violated, and then trying to sort out the practical impact those differences would have had, would be "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150. There is simply no way to judge intelligently such a counterfactual state of affairs, characterized by imponderable what-ifs and speculative maybes. In other contexts, the Court has held that "guesswork," "conjecture," and "speculation" cannot substitute for "reasoned analysis" in constitutional adjudication. *Yeager* v. *United States*, 129 S. Ct. 2360, 2368 (2009) (Double Jeopardy Clause). Just so here.

In the *Chapman* context, therefore, this Court has said that the task of establishing harmlessness or prejudice from a public-trial violation is "a practical impossibility." *Waller*, 467 U.S. at 49 n.9. Accord, *e.g.*, *State* v. *Shearer*, 334 P.3d 1078, 1083 (Wash. 2014)

("We do not require defendants to show prejudice from public trial rights violations because 'it is impossible to show whether the structural error of deprivation of the public trial right is prejudicial.'").[3] Thus, prejudice from courtroom closures is presumed on direct appellate review under *Chapman*. See *Fulminante*, 499 U.S. at 309. Were it otherwise, relief would never be available for violations of the public-trial right, which would be reduced to a guarantee in name only. See, *e.g.*, *People* v. *Jones*, 391 N.E.2d 1335, 1340-1341 (N.Y. 1979) ("To require the defendant to undertake the wellnigh impossible task of proving prejudice would render the right to a public trial illusory.").

These observations are no less true in ineffective-assistance cases like this one; just as a public-trial violation defies harmless-error standards under *Chapman*, it defies actual-prejudice standards under *Strickland*. Because it is impossible "to judge intelligently" a counterfactual state of affairs (*Holloway*, 435 U.S. at 491) just the same under *Strickland* as under *Chapman*, defendants pressing ineffective assistance claims involving structural errors cannot be required to prove actual prejudice, which would otherwise be an insurmountable barrier to relief.

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[3] See also, *e.g.*, *Owens* v. *United States*, 483 F.3d 48, 64 (1st Cir. 2007) (in a public-trial case, holding that "it is impossible to determine whether a structural error is prejudicial"); *Carson* v. *Fischer*, 421 F.3d 83, 95 (2d Cir. 2005) ("it would be, in most cases, virtually impossible for a defendant to demonstrate that the absence of family members or friends from his trial affected its result"); *Commonwealth* v. *Johnson*, 455 A.2d 654, 658 (Pa. 1982) ("To require proof of actual prejudice would force [a] defendant to prove what the disregard of his Sixth Amendment public trial right has made it impossible for him to learn.") (citing *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3rd Cir. 1969) (en banc)).

The SJC turned a blind eye to all of this, imposing on defendants like petitioner a burden to prove prejudice from denials of structural rights, including the public-trial right. That holding cannot be reconciled with this Court's conclusion that such a showing is impossible. See *Shearer*, 334 P.3d at 1083-1084 ("requir[ing] [a] defendant[] to show prejudice" would be "in direct conflict with * * * precedent that public trial rights violations are structural error that are not subject to a harmlessness standard").[4]

Strickland accordingly cannot be understood to require defendants, like petitioner, to establish actual prejudice resulting from structural errors. The purpose of *Strickland*'s prejudice prong is to require defendants to overcome the presumption of reliability that applies to most criminal proceedings. But when counsel's incompetence leads to a structural error like a courtroom closure, that presumption does not apply, and there is therefore nothing for the defendant to overcome. Beyond that, proving actual prejudice resulting from structural errors simply is not possible—a recognized limitation with which the decision below conflicts. For each of these reasons, the SJC's decision must be reversed.

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[4] If the SJC's rule were upheld, the practical impossibility of proving a counterfactual would be unlikely to stop defendants from trying. The evidentiary hearings required to evaluate claims of prejudice arising from structural errors like courtroom closures, involving the testimony of the trial's many participants, would be tremendously burdensome. Indeed, the cost of such sprawling evidentiary hearings would, in all likelihood, often eclipse the burden of simply conducting a new trial on the merits of the indictment. Recent statistics indicate that 77% of criminal cases that go to trial in the federal system are resolved in two days or less. *Sourcebook of Criminal Justice Statistics*, Table 5.42.2010, perma.cc/NH8Q-5665.

III. IF NOT CORRECTED, THE DECISION BELOW WOULD PRODUCE INTOLERABLE RESULTS

The infirmities of the lower court's decision do not end there. The SJC's rule, if allowed to stand, would undermine public confidence in the criminal justice system and lead to manifestly unjust results. The SJC's concern for finality does not remotely overcome these intolerable results.

A. Uncorrected violations of the public-trial right undermine the integrity of the criminal justice system

Uncorrected structural errors undermine the appearance of justice and the integrity of the judiciary. In no circumstance is that more evident than in a case like this one, involving a violation of the public-trial right.

"The requirement of a public trial is," of course, "for the benefit of the accused"; it provides "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Gannett*, 443 U.S. at 380. Accord *Presley*, 558 U.S. at 213. But—as we explained above (at 17-18)—there is also "a strong societal interest in public trials" (*Gannett*, 443 U.S. at 383), so much so that "the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend." *Press-Enter. I*, 464 U.S. at 508.

For one thing, "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers*, 448 U.S. at 571. This so-called "community therapeutic value" (*Press-Enter. I*, 464

U.S. at 508) eases the "natural human reactions of outrage and protest" and answers the "fundamental, natural yearning to see justice done" (*Richmond Newspapers*, 448 U.S. at 571).

For another thing, public trials promote the appearance of justice, and thus the public's confidence in the criminal justice system. "[T]he sure knowledge that *anyone* is free to attend [a criminal trial] gives assurance that established procedures are being followed and that deviations will become known." *Press-Enter. I*, 464 U.S. at 508. Thus, the public-trial right "promotes confidence in the fair administration of justice" (*Richmond Newspapers*, 448 U.S. at 572) and "the appearance of fairness so essential to public confidence in the system" (*Press-Enter. I*, 464 U.S. at 508).

The SJC's answer to the question presented takes no account of the "great, though intangible, societal loss that flows" from structural errors like a denial of the public-trial right. *Waller*, 467 U.S. at 49 n.9 (quoting *Jones*, 391 N.E.2d at 1340). As a consequence, it is certain to inflict damage to the judicial system itself, for "the means used to achieve justice must have the support derived from public acceptance of both the process and its results," which is not possible when violations of the public-trial right are allowed to stand. *Richmond Newspapers*, 448 U.S. at 571. Cf. *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (because "[t]he judiciary's authority * * * depends in large measure on the public's willingness to respect and follow its decisions, * * * 'justice must satisfy the appearance of justice'") (quoting *Offutt* v. *United States*, 348 U.S. 11, 14 (1954)). The SJC's myopic focus on actual prejudice to the defendant, and its resulting accommodation of the closed proceedings in this case, is thus "profoundly inimical to this demonstrative

purpose of the trial process." *Richmond Newspapers*, 448 U.S. at 595.

B. The decision below unjustly penalizes criminal defendants for the deficiencies of their lawyers

The inconsistency of the lower court's decision with the principles espoused in *Strickland*, and its imposition of impossible burdens on defendants and inadministrable standards on the courts, are reasons enough to reverse the judgment below. It weighs yet further in favor of reversal that the SJC's decision is flatly incompatible with basic principles of fairness.

As this case comes to the Court, petitioner has suffered two injuries of constitutional magnitude. There is no doubt that petitioner's "right to a public trial * * * extend[ed] to the jury selection phase of [his] trial" (*Presley*, 558 U.S. at 212), and thus equally no doubt that his public-trial right was violated when the courtroom was closed for two full days, during the jury's empanelment. This was a constitutional violation of the highest order. Ironically, if petitioner's counsel had lodged an objection and the objection had been denied, petitioner would have been able to raise the public-trial violation in his direct appeal to the SJC, where he would have been entitled to a presumption of prejudice and an automatic reversal and remand for a new trial.

But because petitioner suffered a *second* egregious injury—because he was represented by a lawyer who was ignorant of one of the most basic rights protected by the Sixth Amendment—the SJC *denied* him relief. In other words, petitioner was denied relief for each error because of the existence of the other error: The structural defect went uncorrected because his lawyer

was incompetent and failed to object, and his lawyer's incompetence went uncorrected because it resulted in a structural error and prejudice could not be proven. The Court should not tolerate this kind of no-win result when it comes to such foundational constitutional guarantees.

C. The SJC's concern about the public's interest in finality is unfounded

1. Finally, the SJC was wrong to suggest that the rule we advocate will come at a "great cost to the public interest in the finality of verdicts" (*LaChance*, 17 N.E.3d at 1106), for two reasons.

First, "finality concerns" are "weaker" in cases where the presumption of reliability is called into question (*Strickland*, 466 U.S. at 694), as it necessarily is in any case involving a structural error.

Second, rejection of the SJC's rule would rarely lead to new trials in practice. Even under the rule that we advocate, defendants pursuing ineffective-assistance claims must first establish that counsel's performance in failing to object was deficient. This is a "high bar" that is rarely met. *Knowles* v. *Mirzayance*, 556 U.S. 111, 125 (2009). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 124 (quoting *Strickland*, 466 U.S. at 688). "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Ibid.* (quoting same at 669). And "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Ibid.* (quoting same at 690). In light of this "highly deferential" standard, "[s]ur-

mounting" the "high bar" of *Strickland*'s performance prong is "never an easy task." *Premo* v. *Moore*, 562 U.S. 115, 122 (2011) (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 371 (2010)).[5]

What is more, structural errors occur only in "a very limited class of cases" (*Johnson*, 520 U.S. at 468) and "necessarily render a trial fundamentally unfair" (*Rose*, 478 U.S. at 577). Such "extreme deprivations of constitutional rights" arise in "rare instance[s]." *United States* v. *Smith*, 240 F.3d 927, 930 n.5 (11th Cir. 2001) (per curiam). Accord *Washington* v. *Recuenco*, 548 U.S. 212, 218 (2006) (structural errors arise "[o]nly in rare cases"); *United States* v. *Talley*, 315 F. App'x 134, 146 n.5 (11th Cir. 2008) ("structural errors are very rare"); *United States* v. *Pursley*, 550 F. App'x 575, 579 (10th Cir. 2013) ("Structural errors are rare indeed.").[6]

Thus the cases in which a presumption of prejudice will result in new trials are doubly unusual, involving both constitutionally deficient performance and a resulting structural error. Cases like that will be few and far between, and granting relief in such limited circumstances will do little, if anything, to imperil "the public interest in the finality of verdicts" (*LaChance*, 17 N.E.3d at 1106).

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[5] There are many possible strategic reasons that defense counsel might decline to object to a courtroom closure. The lawyer may, for example, wish to avoid irritating the trial judge if the closure is part of the court's routine practice. The lawyer may also think that it is possible to seat a more favorable jury without the check of a watchful public.

[6] It also bears mention that, in light of *Presley*, Massachusetts courts no longer utilize a closed-courtroom procedure for jury selection. The particular circumstances of this case are therefore unlikely to come to pass again.

2. The SJC also raised the possibility that trial counsel, aware that a structural error had occurred, may "depriv[e] the trial court of the opportunity to correct the error at the time it occurs" in order to secure an "appellate parachute" later on, in case the trial turns out badly. *LaChance*, 17 N.E.3d at 1107 (citing *People* v. *Vaughn*, 821 N.W.2d 288, 308 (Mich. 2012)). That is nothing but a bogeyman. If counsel declined to raise an objection for tactical reasons like that, performance would not be deficient. And in any event, few lawyers would be willing to gamble with their clients' rights in that way—particularly given that success on that strategy would require the lawyer to accept a finding that he had been incompetent. Unsurprisingly, there is no evidence of such deliberate sandbagging in the six jurisdictions that presume prejudice in cases like this one.

IV. PETITIONER IS ENTITLED TO A NEW TRIAL

For all of the foregoing reasons, a defendant who shows that his lawyer's incompetent performance resulted in a structural error need not prove actual prejudice under the second prong of *Strickland*'s ineffective assistance test. Petitioner is, as a consequence, entitled to a new trial in this case.

1. As both the trial court and the SJC concluded, the complete, two-day closure of the courtroom during jury empanelment violated petitioner's public-trial right.

As a starting point, "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors." *Presley*, 558 U.S. at 213. But there admittedly are "exceptions to this general rule." *Ibid.* "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a

fair trial or the government's interest in inhibiting disclosure of sensitive information." *Ibid.* (quoting *Waller*, 467 U.S. at 45). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Ibid.* (quoting same).

Waller, in turn, "provided standards for courts to apply before excluding the public from any stage of a criminal trial," including that "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 213-214 (quoting *Waller*, 467 U.S. at 48).

The closure was patently illegal under this framework. To begin with, there was no overriding interest in play here. On the contrary, "[t]he sole reason for the closure was the crowded condition in the courtroom" (Pet. App. 53a), and "courtroom crowding falls short as a justification for the closure at issue here" (*id.* at 58a). To the extent courtroom crowding was the concern, moreover, there were obvious alternatives to closing the proceeding, including "dividing the jury venire panel to reduce courtroom congestion." *Presley*, 558 U.S. at 215.

Beyond all that, *Presley* makes clear that a trial judge must make *Waller* findings "*before* excluding the public." 558 U.S. at 213 (emphasis added). That did not happen here.

2. Counsel's failure to object to the courtroom closure was, moreover, objectively unreasonable. "The defendant did not raise an objection to the court room closure," according to the SJC, solely "because his

attorney did not understand that the public had a right to be present during the jury empanelment phase of the trial proceedings." Pet. App. 40a. But "[g]iven the state of the law in 2006 when this case was tried, counsel should have been aware of the defendant's right to have his family and other interested members of the public attend the empanelment." *Id.* at 63a. Indeed, this Court in 2010 thought that exact same right "so well settled" by *Press-Enterprise* and *Waller* that it issued a summary disposition in *Presley*. 558 U.S. at 213.

The SJC thus held that the trial court, after a lengthy evidentiary hearing, "correctly determined that counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable.'" Pet. App. 40a. More specifically, "defense counsel's failure to object did not result from the exercise of his tactical or strategic prerogatives in managing the trial" but rather "stemm[ed] from a misunderstanding of the law" Pet. App. 62a-63a. Thus, counsel's failure to object to the courtroom closure was not made "in the exercise of reasonable professional judgment" (*Strickland*, 466 U.S. at 690) but instead reflected simple incompetence. Petitioner accordingly is entitled to a new trial.

CONCLUSION

The judgment below should be reversed, and the case should be remanded with instructions to grant petitioner a new trial.

Respectfully submitted.

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In the Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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QUESTION PRESENTED

Whether a defendant who claims that his counsel was ineffective for failing to object to a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's deficiency in order to obtain a new trial under *Strickland v. Washington*, 466 U.S. 668 (1984).

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CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

The jurors at Petitioner's Massachusetts trial for murdering a fifteen-year-old boy were selected in a packed courtroom. While Petitioner's mother and her pastor unfortunately could not enter, the courtroom was filled with dozens of members of the public in the form of prospective jurors. As the defense did not object, the trial judge was never made aware of the spectators' exclusion. He was thus unable to address the potential error at a point when it could have been remedied without causing disruption or substantially burdening any party. Petitioner advanced a post-trial claim that his counsel's failure to object was so serious as to deprive him of his Sixth Amendment right to the effective assistance of counsel. But no such deprivation occurred unless his counsel's error prejudiced the defense in the sense that it was reasonably likely to

have affected his trial's result. And, as Petitioner's situation was not comparable to a complete denial of counsel, he was required to affirmatively show that effect. Yet instead of attempting to do so at his evidentiary hearing or on appeal, he has rested on an argument that he should be relieved of showing prejudice. That argument disregards established Sixth Amendment principles, relying instead on the "structural error" rule applied in a wholly different context. Adopting Petitioner's sweeping rule would result in effective-counsel violations being found where there are none, would disserve important purposes underlying the prejudice requirement, and would incentivize defendants to forego raising timely objections. Such a presumption of prejudice, untethered to the core principles underlying the right to effective assistance of counsel, is also not needed to ensure fairness. Indeed, in Petitioner's own case, such a presumption would be unjust, as any prejudice from his counsel's failure to object to the exclusion of spectators from jury selection was highly improbable. The judgment should be affirmed.

STATEMENT

Following a jury trial in a Massachusetts court, Petitioner was convicted of first-degree murder by deliberate premeditation, in violation of Mass. Gen. Laws ch. 265, § 1, and unlicensed possession of a firearm, in violation of Mass. Gen. Laws ch. 269, § 10(a). Pet. App. 1a. He was sentenced to serve two, concurrent, state-prison terms: one for life, and one for between a year and a year and a day. J.A. 88. The Massachusetts Supreme Judicial Court ("SJC") affirmed his convictions and the denial of his motion

for a new trial in a July 20, 2016 decision. Pet. App. 41a.

1. On August 10, 2003, fifteen-year-old Germaine Rucker was in Boston, Massachusetts, carrying a bag of jewelry that he was selling. Pet. App. 1a-2a; J.A. 90. According to an eyewitness, "a group of males varying in ages . . . rushed toward [Rucker]," a fight ensued with someone other than Rucker "thr[owing] the first punch," and another member of the group ran off with Rucker's bag. Pet. App. 2a-3a. Rucker was shot in the head and the back and left dead in the street. Pet. App. 1a-4a.

2. Following an investigation, Petitioner was indicted for the first-degree murder of Rucker and for unlicensed possession of a firearm. Pet. App. 9a-16a. In 2006, he was tried on those charges before a jury in the Massachusetts Superior Court. Pet. App. 1a. Petitioner was represented by "an experienced criminal defense lawyer" who had a "practice of thoroughly knowing his case" "and applicable law," and a "methodical approach to preparing a defense." J.A. 94, 97-98 & n.7, 105-06.

The jurors heard evidence that a young man was seen carrying a pistol and discarding a distinctive hat while fleeing the area. Pet. App. 3a-4a, 7a, 9a, 12a. The pistol described was consistent with the type of gun that was used to shoot Rucker, and the hat contained DNA matching Petitioner's profile and resembled one that police previously saw Petitioner wearing. Pet. App. 3a-4a, 7a, 9a, 12a. And, after questioning by detectives and his mother, Petitioner went with his mother to the police station, where he

told police, "'I shot Germaine Rucker.'" Pet. App. 1a, 16a.

The jury found Petitioner guilty of first-degree murder by deliberate premeditation and of the firearms offense. Pet. App. 1a.

3. Petitioner commenced a direct appeal to the SJC, where he was represented by new counsel. J.A. 96. While appellate proceedings were pending, in 2011, Petitioner moved for a new trial, claiming that his trial counsel was ineffective. Pet. App. 1a-2a. Among the bases for the motion was that the attorney failed to object to a closure of the courtroom during jury selection. Pet. App. 1a-2a, 38a-42a.

a. A different judge held an evidentiary hearing regarding that claim. Pet. App. 42a-54a. She found as follows.

During the two days of jury selection in Petitioner's case, the courtrooms were very crowded. Pet. App. 38a-39a, 43a-47a, 53a. They were not "large enough to provide seats" for the "large venire[s]" required for murder cases, "usually between sixty and 100 persons." Pet. App. 50a. On the first day, approximately ninety venire members assembled, occupying "every available seat." Pet. App. 38a-39a, 43a. The trial judge commented that "'the courtroom is almost but not quite large enough to accommodate everyone,'" and he referred to people "standing [] for some period of time." Pet. App. 43a-44a. "[T]hose standing were taken into the hall . . . to wait for open seats." Pet. App. 44a. On the second day, "the courtroom crowding was the same," "though perhaps

less so" "[a]fter the lunch break." Pet. App. 44a-45a, 47a, 53a.

On each of the two days, Petitioner's mother and at least one other interested person were denied entry to the courtroom by a court officer who told them it was closed for jury selection. Pet. App. 39a, 48a-53a, 56a. "[T]he courtroom remained closed to them and other members of the public for the duration of the empanelment." Pet. App. 52a-54a, 56a. "The sole reason . . . was the crowded condition in the courtroom." Pet. App. 39a, 53a.

At the end of the first day, "[Petitioner's mother] informed [defense counsel] that she had been refused entry." Pet. App. 49a. Then, "after the morning recess [on the second day], the [prosecutor] alerted the judge to the presence of the defendant's family and other interested parties outside the courtroom." Pet. App. 45a, 60a. He specifically referenced one individual who had "'testified [before] the grand jury,'" was "'a trial witness['s] boyfriend,'" and was "'seated amongst all the prospective jurors'"—adding that he did not "'think it [was] appropriate that [the individual] be out in the hallway with any other friends or associates of the defendant.'" Pet. App. 45a-46a. The prosecutor stated, "'We've taken some steps to make sure that none of the victim's family is up here, although certain one of them are [sic] and they're down on the sixth floor.'" Pet. App. 46a. "Echoing [the prosecutor's] point of view, defense counsel stated, 'If you want me to go out there and tell [the individual in the hallway] to pick some other floor, I'd be glad to.'" Pet. App. 46a (noting that "[n]othing in the record, however, suggest[ed]

any safety or jury-tampering issues involving" such individuals).

"[T]he defendant was unaware that the courtroom was closed or that he had a right to a public trial." Pet. App. 50a, 62a. And, "[b]ecause of his belief that the closure was constitutional, [defense counsel] did not discuss the matter with the defendant[,] suggest to him that his right to a public trial included the empanelment," or object. Pet. App. 39a-40a, 46a-49a & n.1, 60a. "[T]he failure to object was not a strategic choice." Pet. App. 49a-50a, 62a. "Nor did any party or the court voice any concern that the defendant's family was outside rather than inside the courtroom." Pet. App. 46a. "Understandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors." Pet. App. 46a.

b. The motion judge arrived at the following conclusions.

"[T]here was a full closure of the courtroom, rather than a partial closure," and it was not trivial or *de minimis*. Pet. App. 39a, 56a-58a. The closure could not "be justified as a valid limitation of the defendant's Sixth Amendment rights" under the test established by *Waller v. Georgia*, 467 U.S. 39, 48 (1984).[1] Pet. App. 39a, 56a, 58a-60a; J.A. 89.

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[1] Under the *Waller* test, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable

"[T]he defendant . . . did not intentionally waive this right." Pet. App. 62a. But his public-trial claim was still unpreserved. Pet. App. 62a-65a; J.A. 88-89.

"Counsel's failure to object to the courtroom closure, stemming from a misunderstanding of the law governing the defendant's right to a public trial, . . . was not objectively reasonable." Pet. App. 40a, 63a-64a. However, Petitioner did not "offer[] any evidence or legal argument establishing prejudice" in the sense of "a substantial likelihood of a miscarriage of justice."[2] Pet. App. 40a, 64a. Thus, he was not entitled to relief. Pet. App. 65a.

4. Petitioner appealed the motion judge's decision. Pet. App. 2a. That appeal was consolidated in the SJC with his direct appeal of his convictions. Pet. App. 2a.

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alternatives to closing the proceeding, and it must make findings adequate to support the closure."

[2] The "substantial likelihood of a miscarriage of justice" standard is applied in reviewing ineffectiveness claims in direct appeals of first-degree murder convictions in Massachusetts. Pet. App. 30a-31a, 64a. "The court asks '[1] whether there was an error in the course of trial (by defense counsel, the prosecutor, or the judge), and, [2] if there was, whether that error was likely to have influenced the jury's conclusion.'" Pet. App. 30a-31a (quoting, with citation omitted, *Commonwealth v. Lang*, 473 Mass. 1, 19, 38 N.E.3d 262, 276 (2015) (Lenk, J., concurring)). The standard is "more favorable to a defendant than the Federal or State constitutional standards." *Commonwealth v. Mosher*, 455 Mass. 811, 827, 920 N.E.2d 285, 299 (2010); *accord Knight v. Spencer*, 447 F.3d 6, 10-11, 15 (1st Cir. 2006). (And the state constitutional standard is itself more favorable to defendants than the federal one. *See, e.g., Commonwealth v. Marinho*, 464 Mass. 115, 124, 981 N.E.2d 648, 657 (2013).)

The SJC reviewed Petitioner's case under the distinct procedures applicable to direct appeals of first-degree murder convictions in Massachusetts. Pet. App. 2a, 8a, 41a. Those procedures require the Commonwealth's highest court to conduct broad, plenary review of the record, giving consideration to all apparent legal and evidentiary issues, regardless of whether they were preserved below or raised on appeal. *See, e.g.*, Pet. App. 2a, 8a, 41a (observing that "review under [Mass. Gen. Laws ch. 278, § 33E] requires [the SJC] 'to consider all issues apparent from the record, whether preserved or not'" and gives it "extraordinary power" (quoting *Commonwealth v. Randolph*, 438 Mass. 290, 294, 780 N.E.2d 58, 64 (2002))).

The SJC rejected Petitioner's challenges. With respect to the courtroom-closure ineffectiveness claim, the court found the motion judge's factual determinations regarding the crowding, the closure, and the failure to object to be "supported by the evidence." Pet. App. 38a. The court also agreed that there was "a full, rather than partial, closure." Pet. App. 39a. It noted, but did not expressly ratify, the motion judge's determination that the *Waller* test was unmet. Pet. App. 38a.

The SJC agreed with the motion judge's determination that defense counsel's failure to object was not objectively reasonable. Pet. App. 40a. But the court also reaffirmed that:

> "Where the defendant has procedurally waived his Sixth Amendment public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a

> collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply."

Pet. App. 40a (quoting *Commonwealth v. LaChance*, 469 Mass. 854, 856, 17 N.E.3d 1101, 1104 (2014)).

In *LaChance*, the SJC reasoned that "[p]resuming prejudice in this context ignores the distinct and well-established jurisprudence which governs claims of ineffective assistance of counsel." 469 Mass. at 858, 17 N.E.3d at 1105. The SJC recognized that this Court has presumed prejudice in the context of ineffectiveness claims "only in limited circumstances where the essential right to the assistance of counsel itself has been denied," such as "'[a]ctual or constructive denial of the assistance of counsel altogether,'" "'state interference with counsel's assistance,'" and "'an actual conflict of interest'" on counsel's part—none of which existed in LaChance's case. *Id.* at 859, 17 N.E.3d at 1106 (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984), and citing *United States v. Cronic*, 466 U.S. 648, 659 & n.25 (1984)).

The *LaChance* court added that "to say that requiring a showing of prejudice forecloses the possibility of a remedy 'ignore[s]—at great cost to the public interest in the finality of verdicts—the established rule that public trial rights may be waived,' and that claims of ineffective assistance of counsel merit a new trial only where the error may

have affected the verdict." *Id.* at 859-60, 17 N.E.3d at 1106 (citation omitted) (quoting *Commonwealth v. Dyer*, 460 Mass. 728, 735 n.7, 955 N.E.2d 271, 281 n.7 (2011), and citing *Strickland*, 466 U.S. at 691). The court concluded that "[a]lthough it may be difficult to demonstrate prejudice in the context of a closed jury empanelment process," it would not "rule out that possibility." *Id.* at 859 n.3, 17 N.E.3d at 1106 n.3.

In Petitioner's case, the SJC declined to "revise the *LaChance* rule" and presume prejudice. Pet. App. 40a. Instead, it agreed with the motion judge that Petitioner "otherwise failed to show that trial counsel's conduct caused prejudice warranting a new trial." Pet. App. 40a. It noted that Petitioner "d[id] not dispute [on appeal] that he failed to demonstrate prejudice" and "ha[d] not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." Pet. App. 40a-41a. Accordingly, the SJC upheld the denial of the ineffectiveness claim.

Finding other claims by Petitioner meritless, the SJC affirmed Petitioner's convictions and the denial of his motion for a new trial.[3] Pet. App. 41a.

SUMMARY OF THE ARGUMENT

A defendant's Sixth Amendment right to effective counsel is not violated unless the claimed

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[3] The court did find Petitioner entitled to "a corrected mittimus to reflect that his life sentence . . . carries with it the opportunity for parole consideration after fifteen years," given his juvenile status. Pet. App. 41a. He was sixteen at the time of his crime. Pet. App. 1a.

inadequacy in representation affected the judgment. This prejudice element derives from the purposes underlying the right. It bears on whether the adversarial process worked, the trial was fair, and its result was reliable. It also accounts for the gravity of upsetting a criminal conviction, and the potential damage to public confidence in the judicial system where convictions are reversed for errors that had no impact on the outcome.

Where a defendant has received the type of loyal advocate and adversarial testing contemplated by the Counsel Clause, he must prove a reasonable probability that counsel's deficiencies affected the verdict, in order to obtain a new trial. Under *Strickland v. Washington*, the burden is substantial, but not insurmountable, and it was intended to allow for relief where a trial's result has been rendered unreliable. 466 U.S. 668 (1984). While the right to effective assistance is never violated absent prejudice, in certain categories of cases this Court has relieved defendants of having to make individualized showings of prejudice. But these cases involve circumstances that are inherently highly prejudicial, comparable to a complete denial of counsel, creating a likelihood that prejudice actually arose.

This Court should not relieve a defendant of the *Strickland* prejudice requirement when he asserts an ineffectiveness claim based on a failure to object to a structural error. One reason is that doing so would disserve the important interests, recognized by this Court, in maintaining appropriate rules regarding waivers, forfeitures, and contemporaneous objections. The Constitution allows States to enforce rules requiring that constitutional rights be timely

asserted—including in the public-trial context. Such rules ensure that claims are addressed when they can be remedied effectively and without disruption; they prevent litigants from strategically withholding claims; and they promote the finality of judgments.

Another reason is that the distinct treatment of structural errors in the harmlessness context cannot be mechanically carried over to the analysis of whether an ineffectiveness violation has occurred. The structural-error rule generally provides that, when a defendant proves on direct appeal one of several constitutional violations that have been labeled as structural, a court must order relief without regard to harmlessness. The structural-error classification encompasses a wide range of defects with different characteristics that are remedied in different ways. Petitioner's sweeping rule would ignore those distinctions and have this Court treat them all the same.

Yet a third reason not to impose a presumption of prejudice is that, until now, this Court has dispensed with an assessment of harm for structural error only after a constitutional violation has actually been proven. By contrast, this Court has long held that an assessment of *Strickland* prejudice is necessary to determine whether there has been an ineffectiveness violation at all. Indeed, under *Strickland*, prejudice is not presumed simply because an attorney has made mistakes that have the pervasiveness of a structural error; rather, the defendant must still show that the attorney's errors actually affected his defense. Petitioner's approach would also allow for prejudice, and thus an effective-

counsel violation, to be found in at least some cases where there was none.

Fourth, imposing a presumption of prejudice in the *Strickland* context does not adequately account for the fact that assessments of harmlessness and *Strickland* prejudice do not involve the same burdens, standards of proof, or probability of injury. Simply put, forgoing a harmlessness analysis in the context of a proven constitutional error is different than presuming prejudice under *Strickland*, and a lack of harmlessness does not always mean that *Strickland* prejudice exists.

Finally, presuming prejudice would be especially unwarranted where an ineffectiveness claim is predicated on a courtroom closure. Contrary to Petitioner's contentions, while this Court has called public-trial errors structural, it has not found that any assessment of their impact would be inappropriate or infeasible.

And it would be particularly inappropriate to require a showing of prejudice where the ineffectiveness claim is based on the specific type of public-trial error at issue—the exclusion of spectators from a crowded courtroom during jury selection. The proceeding is observed by members of the public in the form of prospective jurors, and it does not involve the presentation of evidence or arguments on the merits of the charge.

In such situations, *Strickland* prejudice is highly unlikely to arise. But when it does, showing a reasonable probability of prejudice is not "impossible," at least where a defendant makes an attempt.

Had Petitioner tried to make such a showing, he would not likely have succeeded. But that is because there was no reasonable probability of a different result. Jury selection was not conducted in "secret." The courtroom was filled with members of the public in the form of prospective jurors, making it improbable that the addition of certain spectators would have been noticed by, much less affected, the participants. Moreover, there is no allegation of, or record support for, a finding that there was, any impropriety or breakdown in the adversarial process during jury selection. And no evidence or arguments on the merits of the charges were offered during that time. Finally, the prosecution's case against Petitioner was strong. Affirmance in this case would further the interests of justice.

ARGUMENT

I. A defendant who challenges a conviction based on his counsel's failure to object to a courtroom closure must show prejudice to establish a Sixth Amendment violation.

A defendant must show prejudice as a precondition for relief when claiming that his counsel was ineffective for failing to object to a public-trial violation or other structural error. A violation of the right to counsel is not complete without prejudice. And requiring it to be shown ensures that a criminal conviction is not set aside unless an attorney's errors affected a trial's result. Prejudice is presumed in only a few situations comparable to a complete deprivation of counsel, given the likelihood that it actually arose—circumstances not present where, as here, counsel's

only claimed error was to fail to object to the closure of the courtroom.

A. The right to counsel guarantees an effective advocate—even if an imperfect one.

"The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). The Counsel Clause seeks to ensure fairness through, among other things, an adversary process. *See, e.g., id.* at 684-700; *United States v. Cronic*, 466 U.S. 648, 653-66 (1984). It "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685.

The involvement of defense counsel in such a system also "'advance[s] the public interest in [discovering the] truth'"—that is, in reaching the *correct* result. *Cronic*, 466 U.S. at 655-56 & nn.14-16, 22 (quoting *Polk County v. Dodson*, 454 U.S. 312, 318 (1981)). Underlying the Sixth Amendment is the "'premise . . . that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Id.* at 655-56 & nn.14-16, 22 (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); *see also Strickland*, 466 U.S. at 685-700 (placing emphasis on achieving "just results," "a trial whose result is reliable," and "confidence in the outcome").

Of course, "the Sixth Amendment does not guarantee the right to perfect counsel." *Burt v. Titlow*, 134 S. Ct. 10, 18 (2013). Rather, it guarantees effective counsel. *See, e.g.*, *Strickland*, 466 U.S. at 683-700; *Cronic*, 466 U.S. at 654-67. The Amendment demands that the defendant be assisted by a competent attorney who will be loyal, advocate for his interests, maintain independence from the government, and subject the prosecution's case to adversarial testing. *See, e.g.*, *Strickland*, 466 U.S. at 681-700; *Cronic*, 466 U.S. at 654-66.

Accordingly, "[r]epresentation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Harrington v. Richter*, 562 U.S. 86, 110-11 (2011) (quoting *Strickland*, 466 U.S. at 686).

B. No violation of the right to effective assistance occurs unless inadequate representation affected the result of the proceeding.

"[A] violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). That is, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692.

That makes sense. "[T]he very nature of the specific element of the right to counsel at issue [is] *effective* (not mistake-free) representation." *Gonzalez-*

Lopez, 548 U.S. at 147. "Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *Id.*

Prejudice also serves as an important measure of whether the trial was fair or instead involved "a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 696, 700; *see also Gonzalez-Lopez*, 548 U.S. at 147 (explaining that the prejudice requirement stems from "the limits of" "the right to effective representation" that are derived from "the purpose of ensuring a fair trial").

Indeed, a prejudice analysis may provide the best estimation of whether, despite an attorney's errors, the trial produced the correct result. It considers "the totality of the evidence," what the "evidentiary picture" would have looked like without the errors, and whether the result would have been the same had they never occurred. *Strickland*, 466 U.S. at 695-96.

Prejudice is also an essential element of a violation because of the gravity of the consequence: vacating a conviction. This Court has long acknowledged that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 684-99.

Requiring prejudice for relief further serves an interest underlying the public-trial requirement—promoting public confidence in the justice system. As this Court has affirmed in other contexts, "[r]eversal

for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson v. United States*, 520 U.S. 461, 470 (1997) (quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970)).

C. The defendant generally must affirmatively show prejudice, in addition to deficient performance.

Where "a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." *Cronic*, 466 U.S. at 656.

So, except in extraordinary situations discussed below, *see* Part I.E, *infra*, a defendant claiming a violation of the right to effective assistance must make two showings. *See Strickland*, 466 U.S. at 687-94. First, he "must show that counsel's performance was deficient," in that it "fell below an objective standard of reasonableness" "under prevailing professional norms," "in light of all the circumstances" and "viewed as of the time of counsel's conduct." *Id.* Second, he "must show that the deficient performance prejudiced the defense," in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

In making those showings, the defendant must overcome a "strong[] presum[ption that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 688-99. There is

likewise a "strong presumption" that the result of the proceeding is reliable. *Id.* at 687, 696.

D. Prejudice is assessed based on a "reasonable probability" standard that accounts for the interest in outcome reliability and the seriousness of the consequences of finding a violation of the right to effective counsel.

Strickland's reasonable-probability standard "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." *Strickland*, 466 U.S. at 694 (citations omitted) (citing *United States v. Agurs*, 427 U.S. 97, 104, 112-13 (1976), and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-74 (1982)). The *Strickland* Court adopted it based on sound policy considerations.

The Court eschewed more lenient options that would have required a defendant merely "to show that the errors had some conceivable effect on the outcome of the proceeding" or that "the errors 'impaired the presentation of the defense.'" *Id.* at 693. As the Court explained, "[v]irtually every act or omission of counsel would meet [a 'conceivable effect' test], and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* (citation omitted). And "[s]ince any error . . . 'impairs' the presentation of the defense, the ['impairment'] standard is inadequate because it provides no way of deciding what impairments are

sufficiently serious to warrant setting aside the outcome of the proceeding." *Id.*

At the same time, the Court rejected a more demanding "more likely than not" or "preponderance of the evidence" standard. *Id.* at 693-97. Significantly, the Court appreciated that an ineffectiveness claim questions the reliability of the proceeding. *Id.* at 694. And it found the reasonable-probability standard more appropriate than the more burdensome standards, because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* That is, the Court ensured that the standard it adopted would enable a defendant with a somewhat weaker ineffectiveness claim to nevertheless show that a proceeding had been rendered unreliable, and to obtain relief as a result.

If the standard cannot be met with ease, that is by design. But it is hardly insurmountable, and it provides an adequate vehicle for addressing situations where attorney error impacts a proceeding's reliability.

E. Prejudice is presumed only in a few situations comparable to a complete denial of counsel—a standard not met by a failure to object to a courtroom closure.

While a defendant never suffers a violation of the right to effective counsel absent prejudice, in a few situations he will be relieved of the burden of *showing*

prejudice. Instead, it will be presumed. But such a presumption arises "only in circumstances of [the] magnitude" of "where assistance of counsel has been denied entirely or during a critical stage." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002). Thus, a defendant will not have to show prejudice where counsel was absent, entirely failed to test the government's case, deprived the defendant of an entire appeal, was saddled by divided loyalties, or was prevented by the state or other circumstances from assisting the defendant effectively.[4] As discussed further below, *see* Part II.C, *infra*, failure to object to a courtroom closure

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[4] *Strickland* identified "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance" as bases for presuming prejudice. 466 U.S. at 683, 686, 692-93. Similarly, *Cronic* discussed circumstances where "the accused is denied counsel at a critical stage of his trial" and where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," further noting that "[c]ircumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." 466 U.S. at 659-66 & nn.25, 26 (also referring to "surrounding circumstances"). Decisions have also referred to "when counsel [was] burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 683, 686, 692-93 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)); *see also Cronic*, 466 U.S. at 658-67 & nn.28, 31; *Mickens*, 535 U.S. at 166. And *Roe v. Flores-Ortega* discussed "denial of [an] entire judicial proceeding itself," specifically an appeal, "which a defendant wanted at the time and to which he had a right"; and even then, it required a presumption of prejudice only after the defendant "demonstrate[s] that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U.S. 470, 482-84 (2000).

is a far cry from "fail[ing] meaningfully to oppose the prosecution's case."

Moreover, this Court has emphasized that a presumption of prejudice applies to some of those constitutional violations only where a deprivation was complete. *See, e.g.*, *Bell v. Cone*, 535 U.S. 685, 696-98 & n.3 (2002) (explaining that "an attorney's failure to test the prosecutor's case . . . must be complete"); *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988) (contrasting complete denial of appellate counsel with ineffectiveness, as when "counsel fails to press a particular argument on appeal" or "fails to argue an issue as effectively as he or she might"). *Strickland* prejudice has never been presumed outside of these limited circumstances. That is in large part because a failure to oppose the prosecution "at specific points" is different in kind than a failure "throughout [a] proceeding as a whole." *Bell*, 535 U.S. at 697.

The predominant reason this Court has presumed prejudice under *Strickland* is the likelihood—and not mere possibility—that prejudice actually arose. As the Court explained in *Cronic*, "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[5] 466 U.S. at 658-67 & nn.28, 31; *see also, e.g.*, *Bell*, 535 U.S. at 695-96; *Mickens*, 535 U.S. at 166, 175.

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[5] As to certain presumptions, the Court added that the "circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland*, 466 U.S. at 692-93.

Although the Court noted that the effect of one presumptively prejudicial form of attorney deficiency—where "counsel [was] burdened by an actual conflict of interest"—was "difficult to measure," that was not the sole reason for presuming prejudice. *Strickland*, 466 U.S. at 692 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)). Indeed, *Cuyler* also "stressed the high probability of prejudice arising from multiple concurrent representation." *Mickens*, 535 U.S. at 166, 175 (citing *Cuyler*, 446 U.S. at 348-49). The Court has never suggested that prejudice should be presumed based solely upon whether it would be difficult to measure the effect of an attorney's error, regardless of the likelihood of prejudice.[6]

This basic limitation on presuming prejudice is consistent with the nature of ineffectiveness violations. Focusing on the likelihood of prejudice allows for a Sixth Amendment violation to be found where assuredly one occurred, and there was thus "a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687-700. In contrast, focusing on the difficulty of measuring harm alone would inevitably allow for prejudice to be found in at least some situations where there was none. Thus, criminal judgments would be set aside for violation of the right to effective counsel where no

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[6] Additional rationales for presuming prejudice where counsel labors under an actual conflict of interest are also specific to that situation. They include: the fact that conflicted counsel "breaches the duty of loyalty"; "the obligation of counsel to avoid conflicts of interest"; and "the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts." *Strickland*, 466 U.S. at 692.

such violation was "'complete.'" *Gonzalez-Lopez*, 548 U.S. at 147.

An attorney's failure to object to a courtroom closure does not involve any of the circumstances in which prejudice is presumed. It is not comparable to a complete denial of counsel. And, as discussed below, *see infra* Part II.C, it is not inherently likely to alter a trial's outcome. It is, at most, the type of specific mistake as to which a showing of prejudice is required. *See Strickland*, 466 U.S. at 683-96; *see also Bell*, 535 U.S. at 696-98; *Cronic*, 466 U.S. at 657 n.20, 666-67 & nn.41,42.

II. This Court should not modify the long-settled *Strickland* standard to relieve criminal defendants of the need to show prejudice in cases where counsel failed to object to a structural error.

The prejudice requirement that is so essential to the *Strickland* test should not be set aside for ineffectiveness claims predicated on structural errors. Allowing a presumption of prejudice in these circumstances would permit defendants to circumvent rules regarding waivers, forfeitures, and contemporaneous objections all too easily. It also would import a rule from the distinct area of harmlessness law, applicable to a range of different errors, into the *Strickland* context, for which it is ill suited. And in at least some situations, a constitutional violation will be found where there was none. Such a presumption would be particularly inappropriate with respect to the public-trial error at issue here. While prejudice from that error will occur only rarely, *Strickland* does not impose an impossible

burden for defendants seeking relief. In Petitioner's case, though, there was no effort to make such a showing, and any effort would likely have been unsuccessful given the improbability of prejudice.

A. Requiring defendants to show *Strickland* prejudice when claiming ineffectiveness for failure to object to a structural error is consistent with sound principles limiting relief for waived and forfeited claims.

Requiring defendants to show *Strickland* prejudice not only furthers the important interests underlying the requirement itself, but also promotes the effective functioning of the justice system in other ways. As this Court has explained:

> "An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve."

Premo v. Moore, 562 U.S. 115, 122, 125 (2011) (quoting, with alteration, *Harrington*, 562 U.S. at 105); *cf. Michel v. Louisiana*, 350 U.S. 91, 101 (1955) (stating, in pre-*Strickland* direct appeal from state conviction, that it "would vitiate state rules of procedure designed to require preliminary objections to be disposed of before trial" to "infer lack of effective

counsel" from counsel's failure to file a timely motion alone).[7]

The principle that rights may be waived or forfeited is as much a part of the constitutional order as the rights themselves. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.'" *Michel*, 350 U.S. at 99 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)); *accord, e.g.*, *United States v. Olano*, 507 U.S. 725, 731 (1993); *Coleman v. Thompson*, 501 U.S. 722, 751 (1991).

Likewise, "[i]t is beyond question that under the Due Process Clause of the Fourteenth Amendment [a State] may attach reasonable time limitations to the assertion of federal constitutional rights." *Michel*, 350 U.S. at 97; *accord Francis v. Henderson*, 425 U.S. 536, 540-42 (1976) (involving habeas corpus appeal). "[C]onsiderations of comity and federalism require that [federal courts] give no less effects to the . . . clear interests [in enforcing such rules] when asked to overturn state convictions" than when asked to reverse federal judgments. *Francis*, 425 U.S. at 541; *see also Coleman*, 501 U.S. at 745-51 (affirming, in habeas action, that "[n]o less respect

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[7] The SJC recognized that Petitioner "'procedurally waived'" his public-trial claim. Pet. App. 39a-40a (quoting *Commonwealth v. LaChance*, 469 Mass. 854, 856, 17 N.E.3d 1101, 1104 (2014)); *see also* Pet. App. 62a-65a; J.A. 88-89 & n.2. There was thus a "forfeiture," in federal parlance. *See United States v. Olano*, 507 U.S. 725, 733-34 (1993).

should be given to state rules of procedure," in light of such considerations).

Public-trial claims that were not raised in accordance with federal or state procedure are no exception. Indeed, in the *Waller v. Georgia* direct appeal, this Court did not require relief in the absence of an objection. 467 U.S. 39 (1984). It "h[e]ld that under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in [*Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501 (1984),] and its predecessors." *Waller*, 467 U.S. at 40, 42 & n.2, 47 & n.6.; *see also Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 7 (1986) (describing *Waller* similarly). And it expressly allowed "[t]he state courts [to] determine on remand whether [one defendant was] procedurally barred from seeking relief as a matter of state law." *Waller*, 467 U.S. at 42 n.2. Though the state's supreme court had "considered [that defendant's] objections . . . on their merits," his trial counsel had failed to object and in fact "concurred in the prosecution's motion to close the suppression hearing." *Id.* *See also Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960), for the proposition that the failure to object to a courtroom closure waives the right to a public trial, depriving the defendant of any constitutional protection); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895-96 (1991) (Scalia, J., joined by O'Connor, Kennedy & Souter, JJ., concurring) ("First Amendment free-speech rights . . . or the Sixth Amendment right to a trial that is 'public,' provide benefits to the entire society more important than

many structural guarantees; but if the litigant does not assert them in a timely fashion, he is foreclosed.").

The same is true in other structural-error situations. Where a defendant timely raises a claim of racial discrimination in selecting a grand jury, her indictment must be dismissed. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988) (citing *Vasquez v. Hillery*, 474 U.S. 254 (1986)). But, "under the Due Process Clause . . . [the State] may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury" and deny relief when that requirement is unmet. *Michel*, 350 U.S. at 97; *accord Francis*, 452 U.S. at 540-42; *see also Coleman*, 501 U.S. at 745-46 (discussing *Francis* with approval).

Nor does this Court set aside other claim-processing rules that call for prejudice to be shown before a defaulted structural error can be remedied. *See Francis*, 425 U.S. at 542 & n.6 (affirming need for cause and actual prejudice to overcome procedural default in habeas challenge to state conviction, notwithstanding "'[t]he presumption of prejudice which supports the existence of the right'" (quoting *Davis v. United States*, 411 U.S. 233, 245 (1973))).

Such restraint is both prudent and necessary to the efficient functioning of a criminal trial. Waiver and forfeiture rules, and the contemporaneous objection rules that often underlie them, provide for defects to be addressed before the parties and court proceed further. *Id.* at 540. As this Court has explained:

> To the greatest extent possible all issues which bear on [the] charge should be determined in [the same] proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.

Wainwright, 433 U.S. at 90.

Such rules also prevent defendants from withholding an objection until a point when the issue, and any consequent retrial, become harder for the prosecution to litigate. *See Francis*, 425 U.S. at 540-41; *see also, e.g.*, *Puckett v. United States*, 556 U.S. 129, 134 (2009) ("The contemporaneous objection rule prevents a litigant from sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."); *Freytag*, 501 U.S. at 895 (Scalia, J., joined by O'Connor, Kennedy & Souter, JJ., concurring) ("To abandon" "the principle that a trial on the merits, whether in a civil or criminal case, is the 'main event,' and not simply a 'tryout on the road' to appellate review" "is to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later—if

the outcome is unfavorable—claiming that the course followed was reversible error.").

These important and long-recognized interests are seriously undermined where a defendant who claims that his counsel was ineffective for failing to object to a structural error is relieved of having to show an effect on his trial. The result is that the waiver or forfeiture would be largely excused. "Any defendant who could not make the prejudice showing necessary to have a defaulted claim of structural error considered could bypass that requirement by merely dressing that claim in ineffective assistance garb and asserting that prejudice must be presumed." *Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006); *see also Commonwealth v. LaChance*, 469 Mass. 854, 858-60 & n.2, 17 N.E.3d 1101, 1105-06 &n.2 (2014) (emphasizing significance of procedural waiver rule, and distinction between public-trial and ineffectiveness claims); *State v. Pinno*, 356 Wis. 2d 106, 153, 850 N.W.2d 207, 230 (2014) ("[A] rule that prejudice must be presumed when counsel fails to object to the exclusion of the public would effectively nullify the forfeiture rule.").

In fact, the approach of withholding an objection in favor of a later ineffectiveness claim would become more attractive to defendants. *See LaChance*, 469 Mass. at 860, 17 N.E.3d at 1106-07 (recognizing that "'counsel can harbor error as an appellate parachute by failing to object to the closure of trial, thereby depriving the trial court of the opportunity to correct the error at the time it occurs'" (quoting *People v. Vaughn*, 491 Mich. 642, 673-74, 821 N.W.2d 288, 308 (2012))); *Reid v. State*, 286 Ga. 484,

488, 690 S.E.2d 177, 181 (2010) (similar); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989) (similar).

Arguing otherwise, Petitioner contends that, "[i]f counsel declined to raise an objection for tactical reasons like that, performance would not be deficient." Br. 35. However, we might never know that counsel's reasons were tactical. And if we did, a court might still find deficient performance on the grounds that such tactics are not reasonable and sound from a legal standpoint. *See Wood v. Allen*, 558 U.S. 290, 303 n.3 (2010) (recognizing distinction between "whether a decision was strategic" and "whether a strategic decision was reasonable"); *Massaro v. United States*, 538 U.S. 500, 504-05 (2003) (recognizing relevance of whether strategy was "reasonable" and "sound"). Petitioner asserts that few would "gamble with their clients' rights in that way," particularly as the "strategy would require the lawyer to accept a finding that he had been incompetent." Br. 35. But an attorney could conclude that an objection would be highly unlikely to affect the trial's outcome, whereas a failure to object, combined with a willingness to keep his thought process to himself and later say "*mea culpa*," could serve his client well on appeal. A zealous advocate might opt for the latter, as Members of this Court have aptly recognized in other contexts. *See Henderson v. United States*, 133 S. Ct. 1121, 1134-35 (2013) (Scalia, J., joined by Thomas & Alito, JJ., dissenting) (stating, as to the notion that there is "no harm in [the] evisceration of the contemporaneous-objection rule" and as to "disbelie[f] that a lawyer would 'deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for 'plain error' later,'" that, "[w]here a criminal case always has been, or has at

trial been shown to be, a sure loser with the jury, it makes entire sense to stand silent while the court makes a mistake that may be the basis for undoing the conviction." (citation omitted)).

Finally, Petitioner suggests that enforcing both state forfeiture rules and the *Strickland* prejudice standard would injure him twice. Br. 32-33. But presuming prejudice would excuse him twice. If the defense took issue with the exclusion of spectators at his trial, it should have objected. It did not. Petitioner's ineffectiveness claim then provided "'a way to escape . . . [his] forfeiture'"—a second chance. *Premo*, 562 U.S. at 125 (quoting *Harrington*, 562 U.S. at 105). Yet, instead of making an attempt to show the prejudice that is required to establish a violation to the right to effective assistance of counsel, he has asked that the prejudice requirement be abandoned. Declining this request would not be unfair.

B. This Court should not import harmlessness law's special treatment for structural errors into the distinct *Strickland* prejudice context.

At bottom, Petitioner's arguments in support of his ineffective-assistance-of-counsel claim are grounded less in the ineffectiveness principles discussed above, and more in precepts from the distinct area of harmlessness law. *E.g.*, Br. 19-20, 26-29. Those precepts include a classification of certain errors as "structural," and a rule that courts should not assess harmlessness when such an error is proven. This Court should decline Petitioner's invitation to merge these two distinct lines of doctrine.

1. The structural-error classification relates to the extent of harmlessness review for certain constitutional violations, once those violations have been shown to have occurred.

The "structural error" concept has been applied only in the context of harmlessness review. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *Hedgpeth v. Pulido*, 555 U.S. 57, 67 (2008) ("In those limited instances in which this Court has found an error 'structural,' [it has] done so because the error defies analysis by harmless-error standards."). But even there, such errors have come in many different forms; the nature of the rights or interests that they seek to protect varies; and the remedies for such errors differ.

Harmless-error review considers whether, notwithstanding the existence of a proven constitutional violation, a court must decline to reverse the conviction because the error did not affect the outcome of the trial. On direct review, the government normally has the burden of showing harmlessness beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24-26 (1967). The structural-error classification was first devised in *Fulminante* by reference to the set of errors as to which the Court had previously declined to require such harmlessness review. *See Fulminante*, 499 U.S. at 309-10.

However, "'structural errors[]' [is] a category [this Court has] never defined clearly." *United States*

v. Marcus, 560 U.S. 258, 270 (2010) (Stevens, J., dissenting). Exactly which errors fall within that set is not well settled. *Compare, e.g., Johnson v. United States*, 520 U.S. 461, 468-69 (1997) (listing six),[8] *with, e.g.*, 7 W. LaFave, et al., Criminal Procedure § 27.6(d) (4th ed. 2015) (listing twelve errors that the authors view as structural based on their treatment by this Court, not including those involving the right to counsel, and several others on which lower courts tend to agree or disagree); 3B C. Wright & P. Henning, Federal Practice and Procedure § 855 (4th ed. 2013 & Jan. 2017 supp.) (similar).[9]

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[8] The Court stated in *Johnson*: "We have found structural errors only in a very limited class of cases: See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (a total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction to jury)."

The Court has added to the list since *Johnson*, but sparingly. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10 (2016) (recognizing "[a judge's] unconstitutional failure to recuse" as structural); *Gonzalez v. United States*, 553 U.S. 242, 253 (2008) ("The Court held in *Gomez v. United States*, 490 U.S. 858 (1989), that imposition of a magistrate judge over objection was structural error."); *Gonzalez-Lopez*, 548 U.S. at 148-52 & n.4 (recognizing denial of counsel of choice as structural).

[9] Additional errors listed in LaFave, excluding those involving the right to counsel, include: "[1] discrimination in the selection of the petit jury; [2] the improper exclusion of a juror because of his views on capital punishment; . . . [and 3] the denial of any opportunity to make closing argument, or of consultation

This lack of clarity may result from confusion about whether this Court's discussion of the errors' characteristics should be viewed as a mere description of those constitutional violations previously held not susceptible to harmlessness review, or as a test for adding new ones to the list—and, if the latter, whether an error must have all of those characteristics or only certain ones. Further uncertainty arises from this Court's recognition that, even if a "*complete denial* of [a right] amounts to structural error," it cannot be assumed that a "*restriction* of [that right] also amounts to structural error." *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (explaining that "[t]hat is all the more true because [the Court's] structural-error cases 'ha[ve] not been characterized by [an] 'in for a penny, in for a pound' approach'" (quoting *Neder v. United States*, 527 U.S. 1, 17 n.2 (1999))).

Moreover, structural errors have different characteristics and are grounded in various constitutional provisions. Some concern trial proceedings, while others concern events before trial. Some concern the legal representation afforded a

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between defendant and his counsel during an overnight trial recess" (footnotes omitted).

Other situations listed in Wright & Henning, but not involving the right to counsel, include: "[1] violation of a defendant's double jeopardy right; . . . [2] the community in which defendant was tried has been exposed to so much damaging publicity that he cannot get a fair trial there; . . . [3] the constitutional test for a violation already required a showing of prejudice; . . . [4] violation of the constitutional right to speedy trial; . . . [and 5] appointment of an interested prosecutor" (footnotes omitted).

defendant, while others concern the identity or actions of jurors or court officials. And the reasons for treating them distinctly have varied from one error to another.[10]

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[10] Certain decisions provided little if any separate justification for dispensing with a harmlessness analysis. *See Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (biased judge).

Other decisions provided a variety of justifications. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10 (2016) (failure of appellate judge to recuse; noting that panel's deliberations are confidential, interested judge may influence others even if judge's vote is not dispositive, and appearance and reality of neutrality are essential for the institution); *Gonzalez-Lopez*, 548 U.S. at 148-52 & n.4 (denial of counsel of choice; "rest[ing its] conclusion . . . upon the difficulty of assessing the effect of the error," but referring also to "fundamental unfairness," "the irrelevance of harmlessness," and the extent to which the error bears on the framework of the trial as criteria cited in past cases); *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993) (defective reasonable-doubt instruction; reaching conclusion largely because, "[t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless," and because "the jury guarantee [is] a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function"); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (jury selection by magistrate judge; citing basic nature of "defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside"); *Vasquez v. Hillery*, 474 U.S. 254, 260-66 (1986) (discriminatorily chosen grand jury; relying largely on: the importance of the defendant's equal protection rights and of eliminating racial discrimination in society; the fact that such discrimination "is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent"; the fact that "alternative

Significantly, structural errors have also been remedied in different ways. *Compare, e.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (explaining that "some [errors] will always invalidate the conviction" and citing denials of counsel, impartial judge, and self-representation as examples), *and Bank of Nova Scotia*, 487 U.S. at 257 (recognizing that "racial discrimination in selection of grand jurors compel[s] dismissal of the indictment"), *with Waller*, 467 U.S. at 49-50 (calling for new suppression hearing as opposed to new trial, at least initially, as a result of original hearing's closure to public, as "the remedy should be appropriate to the violation").

2. The rule for proven structural errors is inappropriate for the *Strickland* test.

The rule providing that courts should dispense with the normal assessment of impact in the case of structural errors cannot logically be imported into the *Strickland* framework. To do so would fundamentally change the right to effective assistance of counsel as this Court has long described it. It would disregard the different characteristics of the errors within the structural category, many of which do not directly relate to the matters that are central to the *Strickland*

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remedies are ineffectual"; the capacity of the discrimination to impact the proceedings; and the difficulty of assessing whether it has); *Waller*, 467 U.S. at 49-50 & n.9 (closure of suppression hearing; citing decisions discussing difficulty of demonstrating harm, and intangible societal loss, in affirming that defendants did not need to show specific prejudice); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation; stating that right is one that "when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant").

test—such as the impact on the verdict and its reliability. And, it would inevitably result in findings of prejudice and effective-assistance violations where, in reality, there was none. Incorporating such a rule for the group of structural errors *en masse* would represent a substantial and unwise change to the criminal justice system.

The structural-error rule was developed for situations where a constitutional violation has already been proven, and the question is whether a court should nevertheless deny relief on the basis of harmlessness. But in undertaking a *Strickland* analysis, a court is addressing the initial fundamental question of whether a violation of the right to effective counsel actually occurred. And the question of whether such a constitutional violation occurred depends in part on whether counsel's errors prejudiced the defense.

That distinction holds even where an attorney's defects pervade a trial in the way that a structural error might, as this Court recognized in *Gonzalez-Lopez*. 548 U.S. at 150. There, the defendant asserted a different type of Sixth Amendment claim—one alleging he was denied his counsel of choice. *Id.* As this Court would later explain, it held in *Gonzalez-Lopez* "that the wrongful deprivation of choice of counsel is 'structural error,' immune from review for harmlessness, because it 'pervades the entire trial.'" *Kaley v. United States*, 134 S. Ct. 1090, 1102 (2014) (quoting *Gonzalez-Lopez*, 548 U.S. at 150); *see also id.* at 1107 (Roberts, C.J., joined by Breyer & Sotomayor, JJ., dissenting) (similar). But the *Gonzalez-Lopez* Court contrasted that claim with an ineffectiveness claim, which requires a showing of prejudice

regardless of the pervasiveness of any attorney errors. 548 U.S. at 146-51. As the Court explained:

> The Government acknowledges that the deprivation of choice of counsel pervades the entire trial, but points out that counsel's ineffectiveness may also do so and yet we do not allow reversal of a conviction for that reason without a showing of prejudice. But the requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*.

Id. at 150. *See also Premo*, 562 U.S. at 128-30 (explaining that a harmlessness inquiry on direct appeal "presumes a constitutional violation, whereas *Strickland* seeks to define one"); *Lockhart v. Fretwell*, 506 U.S. 364, 370 n.2 (1993) (similar).

Just as prejudice is not presumed because the defendant alleges a form of inadequacy having the pervasiveness of a structural error, it should not be presumed because he alleges ineffectiveness based on the failure to object to such an error. A contrary rule would inevitably allow for a result the Sixth Amendment does not permit: a finding of *Strickland* prejudice in at least some situations where it did not exist. In those cases, criminal judgments would be set aside for violation of the right to effective counsel where none occurred.

Moreover, Petitioner errs in reasoning that statements made by this Court about the difficulties

in proving harm under *Chapman* apply equally to proving prejudice under *Strickland*. *E.g.*, Br. 28. *Chapman* requires the government to show that an error was harmless beyond a reasonable doubt, 386 U.S. at 24, while *Strickland* requires the defendant to show that an error was prejudicial by a reasonable probability, 466 U.S. at 694. The standards thus implicate different burdens of proof and different probabilities of prejudice. In light of the difference in standards, *Strickland* prejudice connotes a higher probability of injury than does *Chapman* harm. *See United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring). Accordingly, the fact that an error is deemed harmful in the *Chapman* sense does not mean that it was prejudicial in the *Strickland* sense.

This Court thus recognized in *Premo* that the "prejudice" or "harmless-error" standard applied "on direct review following an acknowledged constitutional error" "cannot apply to determinations of whether inadequate assistance of counsel prejudiced a defendant." 562 U.S. at 128-30 (stating as much in context of plea agreement). And the conclusions reached in a harmlessness inquiry in a particular case "say[] nothing about prejudice for *Strickland* purposes." *Id.* "The lesson of *Premo* is that *Strickland* bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and prejudice." *Walker v. Martel*, 709 F.3d 925, 940 (9th Cir. 2013).

This Court has similarly noted the problems associated with importing the structural-error concept into other areas wholesale, without

considered case-by-case adjudication.[11] For example, it recognized that "[t]he standard for determining whether an error is structural is not coextensive with" the exception under *Teague v. Lane*, 489 U.S. 288 (1989), allowing for retroactive application on collateral review of new watershed criminal-procedure rules. *Tyler v. Cain*, 533 U.S. 656, 665-67 & n.7 (2001) (citation omitted) (rejecting argument that, because error had been held to be structural, it necessarily represented watershed rule). Thus, "a holding that a particular error is structural does not logically dictate the conclusion that the second *Teague* exception has been met." *Id.*

Similarly, that an error has been deemed structural does not logically dictate that the second *Strickland* prong has been met when the error is not challenged by objection. As noted above, prejudice has been presumed in the effective-assistance context only in limited circumstances comparable to a complete denial of counsel; a failure to object to a discrete trial event is very different. *See* Part I.E, *supra*. Nor are all structural errors, which come in many different forms, inherently or equally likely to alter the result of a proceeding. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 148-52 & n.4 (denial of counsel of choice); *Waller*, 467 U.S. at 49-50 & n.9 (closure of a suppression hearing

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[11] Changing the *Strickland* test for this group of errors *en masse* would also be at odds with the sound "common-law method [of] taking cases and controversies as they present themselves, proceeding slowly and incrementally, building on what came before," and "evaluating [guarantees] one by one," thereby "scrutiniz[ing] more closely the right at issue in any given dispute, reducing both the risk and the cost of error." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 881 (2010) (Stevens, J., dissenting).

in its entirety over objection and without sufficient justification); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (selection of a jury by a magistrate judge in excess of his jurisdiction, "in a felony case . . . , despite the defendant's objection and without any meaningful review by a district judge"). Thus, the rule advocated by Petitioner would dramatically, and without limiting principle, expand the range of presumptions for ineffectiveness, and thus the number of cases in which defendants' convictions are set aside despite the lack of a timely objection. And yet, in many of those cases there will have been no prejudice and thus no violation at all.

The failure to object to a structural error also does not necessarily implicate the purposes underlying the *Strickland* prejudice requirement. In particular, an attorney's failure to object to the exclusion of spectators during jury selection does not inherently deprive the defendant of the loyal advocate or adversarial testing of the evidence that the Sixth Amendment was intended to guarantee. Nor does it necessarily serve as a valid measure of the correctness of the verdict. Indeed, whether any kind of error is designated as structural does not necessarily depend on its correlation to the accuracy of the verdict. *See* Part II.B, *supra*.

It follows from all of the above that a rule from the harmlessness context that requires courts to dispense with any assessment of a structural error's impact should not be mechanically carried over to *Strickland*. And certainly, the rule should not be carried over in blanket fashion for the wide range of structural errors to which an attorney might fail to

object. *See* Part II.B, *supra*. That would be inconsistent with "the case-by-case prejudice inquiry that has always been built into the *Strickland* test." *Lockhart*, 506 U.S. at 369 & n.2. As *Strickland* correctly tells us, "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice." 466 U.S. at 693.

C. Presuming prejudice is inappropriate where, as here, an ineffectiveness claim is based on a failure to object to the exclusion of spectators from jury selection.

Presuming prejudice is especially unwarranted as to an ineffectiveness claim involving the particular error here: the failure to object to the exclusion of spectators from jury selection.

Massachusetts shares Petitioner's appreciation for the constitutional imperative of public criminal proceedings, including those involving jury selection. As the SJC has recognized, allowing public access provides "'an effective restraint on possible abuse of judicial power'" and "'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system,'" among other benefits. *Commonwealth v. Cohen (No. 1)*, 456 Mass. 94, 106-07, 921 N.E.2d 906, 917-18 (2010) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948), and *Press-Enterprise I*, 464 U.S. at 508, respectively). And as jury-selection proceedings "are 'a crucial part of any criminal case'" and themselves "'promote[] fairness,'" they are among the proceedings that the public must

be able to observe. *Id.* (quoting *Owens v. United States*, 483 F.3d 63 (1st Cir. 2009), and *Press-Enterprise I*, 464 U.S. at 508, respectively).

But, as discussed further below, Petitioner errs in arguing that there should be no assessment of whether the failure to object in his case affected its outcome. First, while this Court has called public-trial errors structural, it has not suggested that they do not lend themselves to impact assessments. Second, presuming prejudice is particularly unwarranted when the violation involved the exclusion of spectators from a crowded courtroom during jury selection, given the nature of that portion of the proceedings. Third, in such situations, prejudice is highly improbable, but contrary to Petitioner's suggestion, *Strickland* does not impose an impossible burden.

1. The nature of a limited public-trial violation does not necessitate presuming prejudice.

Petitioner errs in arguing for an exception to *Strickland*'s prejudice requirement where an attorney fails to object to a limited public-trial violation. In addition to relying on pronouncements about structural errors generally, his argument is grounded in two premises. The first is that this Court has supposedly found that, because public-trial errors are "'always'" and "'necessarily'" unfair, "prejudice is presumed as a matter of law." Br. 6, 13, 19, 20, 25 (quoting *Neder*, 527 U.S. at 9). The second is that this Court has said it would be impossible for defendants in such situations to show prejudice, including the

type contemplated by *Strickland*. Br. *passim*. Each of these underlying premises is invalid.

This Court has never held that the characteristics of a public-trial violation are such that prejudice is presumed and its impact may never be assessed. Petitioner relies on *Waller*, which involved a suppression hearing that was closed in its entirety. 467 U.S. 39. But there, the Court did not announce an automatic reversal rule and instead evinced concern about upsetting a judgment if the closure had no effect on the proceedings. *See id.* at 49-50. To avoid providing a "windfall for the defendant," which would not be "in the public interest," the Court held that "[a] new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties." *Id.* (explaining that "the remedy should be appropriate to the violation"). The Court thus conditioned the new trial on whether the subsequent suppression hearing (a) resulted in the suppression of evidence that was not barred at the original trial, or a change in a party's position *and* (b) whether that evidence or change was "material." And materiality is little different than *Strickland* prejudice. *See Strickland*, 466 U.S. at 694 ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." (citation omitted)).

Moreover, while the *Waller* Court agreed that "the defendant should not be required to prove specific

prejudice in order to obtain relief for a violation of the public-trial guarantee," 467 U.S. at 49, that is no different than the rule for many constitutional errors on direct review, where the government generally bears the burden of showing harmlessness beyond a reasonable doubt, *see Chapman*, 386 U.S. at 24-26.[12] Such a rule does not require a presumption of prejudice on an associated *Strickland* claim. For example, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (adding that state must satisfy *Chapman* standard). Yet a defendant is still required to show prejudice in claiming his counsel was ineffective for failing to object to shackling. *See, e.g.*, *Roche v. Davis*, 291 F.3d 473, 484 (7th Cir. 2002) (ultimately finding that counsel's failure to object to, and take measures to conceal, shackles during sentencing was prejudicial).

Petitioner also relies heavily on this Court's statement that, where there has been structural error, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as

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[12] Not all of this is clear from Petitioner's brief. It incorrectly states that defendants normally need to show prejudice to obtain relief for a non-structural error. *Compare* Br. 3-4 ("unless the defendant can show" (citing *Sullivan*, 508 U.S. at 279)) *with Sullivan*, 508 U.S. at 279 ("if the State could show"). It also imprecisely cites *Waller* for the notion that "prejudice is presumed as a matter of law" on a public-trial claim. Br. 6, 19, 20, 28. And the brief nowhere acknowledges the specific remedial approach taken in *Waller*.

fundamentally fair.'" *Fulminante*, 499 U.S. at 310 (quoting, with internal citation omitted, *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)); *accord Neder*, 527 U.S. at 8-9. But *Strickland* specifically took account of the need to ensure reliability in selecting the "reasonable probability" standard. 466 U.S. at 694. And the *Rose* Court that originally stated the above words was commenting only on the denial of an "impartial judge" or "represent[ation] by counsel." 478 U.S. at 577-78. *Rose* made no reference to public-trial issues, even as it followed *Waller*.[13] *Fulminante* and *Neder* then repeated the statement in dicta providing a historical overview regarding a series of different structural errors. *Fulminante*, 499 U.S. at 310; *Neder*, 527 U.S. at 8-9. The opinions should not be read as retroactively assigning to public-trial violations a rationale that was expressly limited to other violations.

The second premise underlying Petitioner's argument—that this Court has called proving prejudice impossible—is based on a footnote in *Waller* referencing the difficulty that defendants may have in "prov[ing] specific prejudice" from a public-trial

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[13] In fact, *Rose* affirmed that, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." 478 U.S. at 579; *accord, e.g.*, *Marcus*, 560 U.S. at 265; *Neder*, 527 U.S. at 8. "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed," the Court added. *Rose*, 478 U.S. at 579.

violation.[14] 467 U.S. at 49 & n.9. While the Court did not elaborate on the term "specific prejudice," the "demonstrat[ion of] prejudice" feared by the *Waller* defendants involved showing that "[the] motion to suppress *would have been granted* if the hearing had been open." Reply Brief for Petitioners in *Waller v. Georgia*, O.T. 1983, Nos. 83-321, 83-322, 1984 WL 563981, at 3 n.2 (emphasis added). Proving prejudice in that sense would involve more than the reasonable probability of a different outcome that *Strickland* requires. *Cf. Morris v. Slappy*, 461 U.S. 1, 28 n.9 (1983) (Brennan, J., joined by Marshall, J., concurring) ("There is a difference between a requirement that a defendant suffer some prejudice and a requirement that he show some specific prejudice.").

Petitioner's proposed rule thus finds no sound basis in this Court's public-trial precedents.

2. Presuming prejudice from the failure to object to the exclusion of spectators from jury selection is inappropriate.

Just as there is variation among structural errors, *see* Part II.B, *supra*, there is variation among public-trial errors. They differ based on the stage at

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[14] Given the placement of such statements in *Waller*, and the fact that some of them are merely contained in parentheticals following citations to lower-court opinions, the extent to which they were central to the Court's decision is questionable. *Cf. United States v. Bobo*, 419 F.3d 1264, 1268-69 (11th Cir. 2005) ("[C]ourts generally do not make a habit of hiding away important holdings in afterthought footnotes.").

which they occur, the extent of their severity, and other factors. At one end of the spectrum, a preliminary hearing on an insignificant matter of trial procedure might be closed for fifteen minutes without a judge's knowledge. At the other end of the spectrum, a trial could be closed to all members of the public for its entirety. Petitioner has offered no persuasive basis for treating all such violations the same under *Strickland*. *Cf. Waller*, 467 U.S. at 50 ("[T]he remedy should be appropriate to the violation."); *Glebe*, 135 S. Ct. at 431 (stating, as to the recognition of new structural errors, "our structural-error cases 'ha[ve] not been characterized by [an] 'in for a penny, in for a pound' approach'" (quoting *Neder*, 527 U.S. at 17 n.2)); *Marcus*, 560 U.S. at 264-65 (explaining that a showing of prejudice should not be dispensed with as to a certain category of errors, as they "come in various shapes and sizes," they vary based on "[t]he kind and degree of harm" and the manner in which they may be remedied at trial, and there is "no reason to believe that *all or almost all* such errors *always*" have the characteristics of a structural error).

And presuming prejudice is especially unwarranted with respect to the specific type of public-trial violation at issue here—recognized as such in *Presley v. Georgia*, 558 U.S. 209 (2010)—where spectators are excluded from jury selection.

Even where spectators are denied entry, jury-selection proceedings are necessarily subject to public observation in a way that other closed proceedings are not. The hearing in *Waller* was "closed to all persons other than witnesses, court personnel, the parties, and the lawyers." 467 U.S. at 42. This was problematic, as "'judges, lawyers, witnesses, and

jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" *Id.* at 46 & n.4 (parenthetically quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)). But such secrecy does not exist where a juror voir dire proceeding is observed by a courtroom filled with members of the general public in the form of prospective jurors. *Cf. Press-Enterprise II*, 478 U.S. at 12-13 (explaining that public access to preliminary hearing was made more significant by "the absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the [compliant], biased, or eccentric judge'" (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968))).[15]

Moreover, while *Waller* discussed the benefits of public trials generally, it gave much attention to the characteristics of suppression hearings in particular: "witnesses are sworn and testify"; "counsel argue their positions"; "[t]he outcome frequently depends on a resolution of factual matters"; that outcome may prompt a plea bargain; and there are often "attacks [on] the conduct of police and prosecutor," which the public has a "strong interest" in "scrutin[izing]." 467 U.S. at 46-47 & n.5. Indeed, "[t]he need for an open proceeding may be particularly strong with respect to suppression hearings," the Court maintained. *Id.* at

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[15] *Press-Enterprise II* is distinguishable not only because there were no jurors, but also because it was decided under the First Amendment, and the Court emphasized that, "[b]ecause of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding" and in many cases provides the only chance for public observation. 478 U.S. at 7, 12.

47. A jury-selection proceeding will not necessarily have those characteristics.[16]

It is also difficult to see how the exclusion of spectators from jury selection could be treated as presumptively altering the verdict without a significant assumption: that either the actual jury or a differently-constituted jury would have decided the case based on factors other than the evidence. But that would be the opposite of what this Court says to presume. *See Strickland*, 466 U.S. at 694-95. *Strickland* instructs a court assessing prejudice to "presume . . . that the judge or jury acted according to law," and "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision," "even if a lawless decision cannot be reviewed." *Id.* (making exception for where defendant also claims evidentiary insufficiency). *Strickland* also requires the defendant to establish "a reasonable probability that, absent the errors, the factfinder would have had a *reasonable* doubt respecting guilt." *Id.* at 695 (emphasis added). "A 'reasonable doubt' has often been described as one 'based on reason which arises from the evidence or lack of evidence.'" *Jackson v. Virginia*, 443 U.S. 307, 317 n.9 (1979) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972)). It is

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[16] *Cf. Fulminante*, 499 U.S. at 307 (observing that Court applied harmless-error analysis in *Rushen v. Spain*, 464 U.S. 114 (1983), which involved allegations that defendant's right to be present at trial was violated by trial judge's unrecorded, *ex parte* conversation with juror concerning her familiarity with event mentioned at trial, which she unwittingly failed to disclose during voir dire); *accord Rose*, 478 U.S. at 576 (similar).

not a "fanciful" one. *Victor v. Nebraska*, 511 U.S. 1, 7-23 (1994).[17]

3. The failure to object to a *Presley* error may very rarely lead to *Strickland* prejudice, but any such prejudice would not be "impossible" to show.

In contrast to those circumstances in which prejudice for ineffectiveness has been presumed, the failure to object to a *Presley* error is unlikely to affect the outcome of the case or form the basis for a valid *Strickland* claim. But in the rare case where counsel's error does cause such prejudice, it would not, contrary to Petitioner's contentions, be "impossible" to show.

For *Strickland* prejudice to arise from counsel's failure to object, the failure to object must have affected the proceedings. Thus, no prejudice arises where an objection would only have caused a conscientious judge to find the closure justified under the *Waller* factors. For those closures not justified under *Waller*, the defendant must show that, "absent" the erroneous exclusion of spectators during jury selection, "the factfinder would have had a *reasonable* doubt respecting guilt," *Strickland*, 466 U.S. at 695 (emphasis added), meaning a doubt "'based on reason

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[17] Even as *Presley* focused on a defendant's Sixth Amendment right to a public trial, its holding was based in part on concerns for the First Amendment rights of spectators. 558 U.S. at 214-15 ("The public has a right to be present whether or not any party has asserted the right."). But when a defendant's claim is based not directly on the right to a public trial, but rather on the right to effective counsel, the First Amendment interests of third parties are more attenuated.

which arises from the evidence or lack of evidence,'" *Jackson*, 443 U.S. at 317 n.9 (quoting *Johnson*, 406 U.S. at 360). So, the mere possibility that a differently constituted jury might have rendered a different verdict based on the same evidence does not qualify. And such prejudice is less likely in cases where the verdict had "overwhelming record support." *Strickland*, 466 U.S. at 695-96.

However, there may occasionally be unusual or egregious circumstances that present a sound basis for believing that prejudice arose from a courtroom closure during jury selection, perhaps because of a particular trial participant's behavior in the closed courtroom or a connection between an excluded spectator and the proceedings. The defendant may couple an explanation of how those circumstances may have affected the jury's consideration of the case with arguments that the "verdict [was] only weakly supported by the record," and thus "more likely to have been affected by [the] error[]." *Id.* at 695-96. In such a case, *Strickland*'s reasonable-probability standard could be met.

4. Had Petitioner attempted to show actual prejudice, he probably would have failed, because it was highly unlikely to have arisen.

In Petitioner's case, two factors did make it difficult for him to show prejudice. First, he did not even attempt to make such a showing. And second, it is highly unlikely that any prejudice arose.

Although Petitioner's public-trial claim was forfeited, he had a second chance to press the issue through an ineffectiveness claim. He secured an evidentiary hearing on the claim, and the opportunity to have it evaluated under a Massachusetts standard more generous than that provided under the federal constitution as part of the state plenary appellate review process. *See* Statement, *supra*; Pet. App. 2a, 8a, 30a-31a, 38a, 41a, 43a-54a; J.A. 88. Yet Petitioner made no attempt to show prejudice. Pet. App. 40a-41a, 64a. Instead, he relied on an argument that he makes here—that it would be impossible for him to make such a showing.

But even if he had attempted such a showing, he would have had to confront the reality that any prejudice was highly improbable. During jury selection at his trial, the courtroom was not free from the watchful eye of the public; rather, a large group of prospective jurors was there to observe. Pet. App. 38a-39a, 43a-47a, 50a, 53a. *Cf. Press-Enterprise II*, 478 U.S. at 12-13. So, it is not true that "the jury that would ultimately convict [Petitioner] was selected in secret." Br. 1.

Moreover, the overcrowding would have lessened the likelihood that any participants would have noticed, or been affected by, the admission or exclusion of a few more people. Indeed, "the defendant was unaware that the courtroom was closed," Pet. App. 50a, 62a, and "[u]nderstandably, the court's attention was focused on conducting an efficient, fair and uneventful empanelment without undue inconvenience to prospective jurors," Pet. App. 46a.

Notably, Petitioner "does not claim that the courtroom's closure during voir dire affected the voir dire process and tainted the ultimate jury chosen." *Vaughn*, 491 Mich. at 674, 821 N.W.2d at 308. Nor does the transcript suggest that the exclusion of spectators led to any "breakdown in the adversary process" or lack of "fundamental fairness" during the proceeding. *Strickland*, 466 U.S. at 687, 696, 700. For example, in addition to asking a set of questions to the venire as a whole, the judge spoke with prospective jurors individually about their attitudes toward police, racial bias, and whether the nature of the case would impact their ability to be fair and impartial. Tr. 04/07/06; 04/10/06. He also appropriately struck jurors who had substantial time commitments, admitted to bias, had some familiarity with individuals involved in the case, or otherwise raised doubts about their ability to serve properly. *Id.* And the defense exercised all or nearly all of its peremptory strikes. Tr. 04/10/06, at II:217-18.

Given all these factors, it is not realistic to surmise "that jurors might have been more forthcoming about biases and past experiences if they had faced" the added spectators, or that "[the defendant] and the Government might have picked a more impartial jury or asked different questions" with additional citizens watching, *Owens*, 483 F.3d at 65.

Petitioner contends that we can never really know how the admission of spectators would have affected jurors or other participants, or what they would have done otherwise. Br. 6, 19. But a degree of uncertainty inheres in virtually any *Strickland* prejudice inquiry; uncertainty is inevitable in applying a standard that searches for a "reasonable

probability" about what "would have" happened "absent [certain] errors." *Strickland*, 466 U.S. at 694-95; *cf. Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (observing as to ineffectiveness in sentencing that *Strickland* standard "will necessarily require a court to 'speculate' as to the effect of the new evidence").

There are still other reasons why there is no reasonable probability that the verdict was affected by the failure to object to the spectators' exclusion from jury selection. No witnesses or evidence was offered during that time. Tr. 04/07/06; 04/10/06. *Contrast Waller*, 467 U.S. at 46-47 & n.5. The "totality of the evidence" that ultimately was introduced provided strong "record support" for the verdict. *Strickland*, 466 U.S. at 695-96. It included Petitioner's confession, as well as DNA, ballistics, and eyewitness evidence. Pet. App. 1a-4a, 7a, 9a, 12a, 16a, 23a, 26a; J.A. 89-90, 94. And there has been no suggestion that spectators were excluded from the courtroom when that evidence was offered, or at any other point after jury selection. Any benefits from the presence of the public would have been realized during that time.[18]

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[18] Of course, all this assumes that defense counsel's conduct was even deficient in the *Strickland* sense. *Compare* Pet. App. 46a n.1, 51a n.7, 63a-64a (reflecting motion judge's observation that "the custom and practice of closing the courtroom to the public during empanelment, especially in murder cases, was prevalent" at the time, but finding that "counsel's failure to object . . . stemming from a misunderstanding of the law . . . was not objectively reasonable"), *with Strickland*, 466 U.S. at 688-90 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."), *and Harrington*, 562 U.S. at 110 ("*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.").

In sum, even with the spectators' exclusion, the proceeding at issue was not shielded from the public; to the contrary, the courtroom was packed with the jury venire. Given that fact, the weight of the evidence, and the other factors described above, it is highly unlikely that closing the courtroom during jury selection affected the judgment. Even if defense counsel erred in acquiescing to this closure, Petitioner was not deprived of the loyal and effective advocate that the Sixth Amendment envisions. His trial was not unfair and did not produce unreliable or unjust results. Reversal here would be fundamentally at odds with the right to the assistance of counsel as this Court has described it until now and would hand Petitioner a windfall. Contrary to his suggestions, such an outcome would not promote, but would instead undermine, public confidence in the adjudicative process.

CONCLUSION

The judgment of the Massachusetts Supreme Judicial Court should be affirmed.

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In the Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Imagine a criminal defendant is being held in a windowless chamber, awaiting trial. Into the chamber marches a judge, a prosecutor, twelve jurors, and a defense lawyer who knows no better than to accept the situation. Over the next few days, the defendant is tried in the windowless room, behind closed doors, as witnesses are brought in to testify against him. All who think a trial might be taking place—members of the press and his family alike—are turned away. The defendant is thus secretly tried and secretly convicted; and although his lawyer knows enough to put on an otherwise adequate defense, he is ignorant of his client's public-trial right and does not object to the closure of the proceedings.

The Commonwealth's position is that, when the defendant later seeks post-conviction relief on the grounds that his public-trial right was violated and his lawyer was incompetent for failing to object, the reviewing court may not order a new trial unless it first finds that the presence of the public would have changed the outcome of the proceedings. Otherwise, the Commonwealth insists, there is no basis to believe that the trial—though held entirely in secret—was fundamentally unfair.

That position cannot be squared with this Court's cases, which make clear that fairness, in both appearance and actuality, inheres not only in the accuracy of verdicts, but in the constitutionally guaranteed procedures that produce them. Any other conclusion would deprive the Sixth Amendment of meaning.

Strickland accordingly does not require the unjust result that the Commonwealth defends. The Court was clear in *Strickland* that the focus of the ineffective-

assistance inquiry is the fundamental fairness of the trial whose result is being challenged. One way (the "general" way) to establish that an attorney's error rendered the trial unfair is to demonstrate that the error undermined confidence in the verdict, overcoming the ordinary presumption that the trial was reliable. But another way to establish that defense counsel's incompetence resulted in unfairness is to show that it perpetuated a structural error. Because the hallmark of structural error is fundamental unfairness, proof of a structural error alone will demonstrate that the verdict is legally tainted and cannot stand, regardless of any additional effect the error may have had on the actual outcome. Requiring defendants to establish a second time that the trial was infected with unfairness, with proof of actual prejudice, would be redundant. The Commonwealth declines to address this fundamental point.

That alone is enough to reverse. But we also showed in the opening brief (at 26-29) that the Commonwealth's rule is inconsistent with settled precedent providing that, because structural errors affect the entire framework within which the trial proceeds, their practical effects cannot be ascertained. In this case, for example, there would be no way to unwind the clock to show how the participants in the proceedings would have behaved differently—or, indeed, who the participants would have been to begin with—had the courtroom doors been kept open. By requiring defendants to demonstrate what this Court has said cannot be demonstrated, the Commonwealth's proposed rule would thus foreclose relief under *Strickland* in all cases where defense counsel's incompetence perpetuates structural error, the gravest of constitutional trespasses. That would turn *Strickland*'s core purpose—to guarantee fair trials—on its head.

These points, laid out fully in the opening brief, go largely unanswered by the Commonwealth. And as we demonstrate more fully below, what little the Commonwealth does say is unpersuasive. The judgment below accordingly should be reversed.

A. When deficient performance results in structural error, the trial is rendered fundamentally unfair without any additional showing of prejudice

1. As we explained in the opening brief (at 20-22), "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). *Strickland*'s prejudice prong thus plays a specific role in the ineffective-assistance inquiry: Because "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," and because trials are presumed fair and reliable (*Strickland*, 466 U.S. at 696), it follows that, to demonstrate that an attorney error rendered the trial unfair in cases not involving structural error, a defendant will have to show that the error actually "undermined the reliability of the finding of guilt" (*Cronic*, 466 U.S. at 659 n.26).

The Commonwealth agrees that the purpose of the prejudice inquiry is to determine whether, despite the presumption of reliability applicable in most cases, "the trial was [un]fair"; it thus cites *Strickland* and *Gonzalez-Lopez* for the proposition that "the prejudice requirement stems from * * * 'the purpose of ensuring a fair trial.'" Resp. Br. 17. Accord U.S. Br. 11.

But the Commonwealth ignores the necessary upshot: The actual-prejudice requirement is superfluous

when there is an independent and alternative basis for concluding that defense counsel's error rendered the trial fundamentally unfair. That is the case where—as here—trial counsel incompetently fails to object to a structural error, which (thus allowed to stand) infects the trial with unfairness. Because "[t]he touchstone of structural error is fundamental unfairness and unreliability" (*United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 159 (2006) (Alito, J., dissenting)), there would be no point in requiring a defendant who shows that his lawyer's error resulted in structural error to establish unfairness a *second* time with proof of actual prejudice. Regardless of such additional proof, the trial "cannot reliably [have] serve[d] its function as a vehicle for determination of guilt or innocence." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991).

Both the Commonwealth and the United States thus misunderstand our argument when they say that it is "difficult to see how the exclusion of spectators from jury selection could be treated as presumptively altering the verdict" (Resp. Br. 51) and "structural errors do not inevitably create circumstances where a different trial outcome is so likely that litigating prejudice in every case is unjustified" (U.S. Br. 19). Our position is not that proof of a structural error necessarily satisfies the actual-prejudice requirement; it is that structural error renders the trial fundamentally unfair and unreliable all on its own, "regardless of [its] actual impact on [the] trial." *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (discussing plain error).

2. Although the Commonwealth never directly responds to these arguments, it makes two points that might be understood as rejoinders.

a. The Commonwealth observes that "[a] violation of the right to counsel is not complete without preju-

dice." Resp. Br. 14. "That is, 'any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.'" *Id.* at 16 (quoting *Strickland*, 466 U.S. at 692). Accord U.S. Br. 24.

But again, "the ultimate focus of [the ineffective-assistance] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. Thus, the better and fuller understanding of the language cited by the Commonwealth is that a violation of the Sixth Amendment's effective-assistance guarantee is not established *absent a showing of fundamental unfairness*. Although the "general standard[]" for showing fundamental unfairness in a *Strickland* case is a reasonable probability actual prejudice (466 U.S. at 698), this Court has never held that that is the exclusive way of doing so; while all inaccuracies may result in unfairness, it does not follow that every unfairness must be the result of an inaccuracy.

That conclusion finds strong support in *Strickland* itself. The Court there explained that, given the focus on fairness above all else, actual prejudice is only "a *general* requirement that the defendant affirmatively prove prejudice" to establish the unfairness of the proceedings (466 U.S. at 693 (emphasis added)); it thus admonished that "the principles we have stated do not establish mechanical rules" (*id.* at 696). The Commonwealth's inflexible adherence to the actual prejudice requirement as the only possible means of establishing unfairness is not compatible with that statement. We made this exact point in the opening brief (at 26), but the Commonwealth declines to respond.

b. The Commonwealth says that our position "disregards established Sixth Amendment principles."

Resp. Br. 2. But the only "established Sixth Amendment principle" that the Commonwealth ever cites is *Strickland*'s prejudice requirement, which it insists (without elaboration) is applicable in all ineffective-assistance cases, including this one. See, *e.g.*, Resp. Br. 11 (a defendant pressing an ineffective-assistance claim "must prove a reasonable probability that counsel's deficiencies affected the verdict, in order to obtain a new trial"); Resp. Br. 17, 20 (similar).

The Commonwealth's repeated, unadorned citation to *Strickland*'s actual prejudice requirement sheds no light on the question presented in the petition.

3. We further explained that a violation of the public-trial right not only deprives the defendant of a fair trial per force, but also (and as such) undermines the reputation and integrity of the criminal justice system. Petr. Br. 30-32. "[T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results," but "it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571-572 (1980). The public-trial right is critical to "promot[ing] confidence in the fair administration of justice" (*id.* at 572) and "the appearance of fairness so essential to public confidence in the system" (*Press-Enter. Co.* v. *Superior Court*, 464 U.S. 501, 508 (1984)). Thus, declining to correct violations of the public-trial right because the defendant suffers the added insult of representation by incompetent (often court-appointed) counsel diminishes the integrity of the criminal justice system, in both appearance and actuality.

As the Reporter's Committee explains in its amicus brief (at 5-11), moreover, the Commonwealth's rule would unfairly burden the public, whose First Amend-

ment rights are violated by courtroom closures. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enter. Co.* v. *Superior Court*, 478 U.S. 1, 7 (1986).

The Commonwealth does not deny any of this. The United States, for its part, brushes the point aside with the question-begging assertion that "[t]hose important underpinnings of the public-trial right have no bearing on a *Strickland* prejudice analysis." Br. 21. We do not disagree; indeed, it is precisely our point that a rote application of the ordinary *Strickland* prejudice analysis to cases involving structural errors is inadequate to account for the very serious injury inflicted by unaddressed structural errors upon the criminal justice system as a whole. And the risk to the integrity of the system is compounded by the rationale upon which the United States would allow such grave constitutional violations to stand: the deficient performance of court-appointed defense counsel.

B. The acknowledged violation of petitioner's public-trial right was a structural error not susceptible to an actual-prejudice analysis

1. There is a another reason to reject the Commonwealth's rule: As we showed in the opening brief (at 26-29), this Court has held that structural errors, including the denial of the public-trial right, "defy analysis by harmless-error standards by affecting the entire adjudicatory framework." *Puckett* v. *United States*, 556 U.S. 129, 141 (2009) (quoting *Fulminante*, 499 U.S. at 309). "Errors of this type" are "intrinsically harmful" (*Neder* v. *United States*, 527 U.S. 1, 7 (1999)) and "not amenable to harmless-error review." *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986).

We explained in the opening brief (at 19, 27) why this is so: To ask what would have happened absent a courtroom closure is to ask how the trial might have proceeded in an alternate universe. There is no way to meaningfully assess how the judge, lawyers, witnesses, courtroom officers, and venirepersons or jurors would have behaved differently in the presence of the public. And it would add a second layer of guesswork to attempt to determine how any of those differences might have affected the outcome of the trial.

The required speculation is not diminished in this case because the closure took place during jury empanelment rather than the presentation of the evidence. As the First Circuit has explained:

> It is possible that jurors might have been more forthcoming about biases and past experiences if they had faced the public. It is also possible that [the parties] might have picked a more impartial jury or asked different questions with local citizenry watching.

United States v. *Negron-Sostre*, 790 F.3d 295, 306 (1st Cir. 2015) (quoting *Owens* v. *United States*, 483 F.3d 48, 65 (1st Cir. 2015)). Maybe a venireperson would have answered a question slightly differently, so that she was struck rather than seated. Maybe not. Maybe the lawyers would have been more sensitive to this Court's *Batson* line of cases and exercised their strikes in different ways. Maybe not. There is no way to know—no way to unscramble the egg—without engaging in pure speculation.

In response, the Commonwealth offers mere *ipse dixits*: The burden of establishing actual prejudice "is substantial but not insurmountable" (Resp. Br. 11), "hardly insurmountable" (*id.* at 20), and "not * * * im-

possible" (*id.* at 44). But the only support the Commonwealth offers is to say that "there may occasionally be unusual or egregious circumstances that present a sound basis for believing that prejudice arose from a courtroom closure during jury selection." Resp. Br. 53.

That is plainly wrong. Even supposing that a "particular trial participant's behavior" was especially aberrant or that a specific "excluded spectator" had some "connection" with the proceedings (Resp. Br. 53), attempting to determine what would have happened if the courtroom doors had been opened—and then attempting to determine whether the difference would have resulted in a different jury, and in turn whether a different jury would have resulted in a different verdict—would manifestly remain "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150. Proving that there conceivably could have been a difference is not the same thing as proving what the difference would have been (the same jury or a different one?) or how it would have affected the outcome.

2. For its part, the United States acknowledges that *Strickland*'s prejudice framework requires evaluating what the finder of fact would have decided "absent counsel's error." U.S. Br. 11. But the test that the United States proposes for addressing structural error (*id.* at 18-19) is inconsistent with that framework; the government proposes to ask whether the evidence was sufficient for a conviction *despite*—not *absent*—the error.

This Court has rejected such an approach several times before. By the government's rationale, for example, a defendant whose counsel failed to file a notice of appeal would have to show not just that he would have appealed, but also that he would have obtained a

reversal or vacatur. That position was rejected by *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), which held that a defendant need show only that "he would have timely appealed." *Id.* at 484. Similarly, a defendant whose counsel gave deficient advice in the plea process would have to show not just that he would have gone to trial, but also that he would have been acquitted. That position similarly was rejected by *Hill* v. *Lockhart*, 474 U.S. 52 (1985), which held that a defendant must show only that "he would have elected to plead not guilty and proceed to trial." *Missouri* v. *Frye*, 566 U.S. 133, 141 (2012) (citing *Hill*, 474 U.S. at 60).

Faithfully extending the reasoning of *Roe* and *Hill* to the context of a courtroom closure means that a defendant need show only that absent the unlawful closure, he would have enjoyed a public trial. That, of course, is always and automatically the case.

3. We observed in the opening brief (at 28) that the *Chapman* harmless-error analysis and *Strickland* prejudice analysis involve an inquiry of the same basic character, and that the impossibility of undertaking one thus implies the impossibility of undertaking the other. The Commonwealth resists this conclusion, observing that, because the *Chapman* and *Strickland* standards "implicate different burdens of proof and different probabilities of prejudice, * * * the fact that an error is deemed harmful in the *Chapman* sense does not mean that it was prejudicial in the *Strickland* sense." Resp. Br. 40.

That is true but irrelevant. The impossibility of a prejudice analysis arises from the nature of the *error*, not from the specific procedural context in which the analysis is undertaken. When the error affects the entire framework of the trial, it is impossible to determine what the participants in the proceedings would

have done differently absent the error—indeed, in the context of a courtroom closure, it is impossible to know even who the participants would have been.

Thus, our point is not that the harmlessness and prejudice inquiries are equivalent, so that an absence of harmlessness necessarily entails the presence of prejudice. The point, instead, is that the two inquiries take account of the same basic considerations, and if the effects of an error are "unmeasurable," "unquantifiable," and "indeterminate" in the *Chapman* sense (*Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993)), they are likewise so in the *Strickland* sense.

At bottom, neither the Commonwealth nor its amici engage this critical point; none provides any explanation for why the government cannot prove "harmlessness" with respect to a structural error, but a defendant like petitioner supposedly *can* prove "prejudice" with respect to the same error. See U.S. Br. 23 ("The government cannot satisfy [its *Chapman*] burden in the case of a structural error because 'the effect of the violation cannot be ascertained.'") (quoting *Vasquez*, 474 U.S. at 263)).[1]

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[1] Neither *Premo* nor *Walker* (Resp. Br. 40), helps the Commonwealth on this point. *Premo* addressed the question of when a *Strickland* claim is clearly established by this Court's precedents under the Antiterrorism and Effective Death Penalty Act; the Court held simply that *Fulminante* did not "clearly establish" federal ineffective-assistance law because it was not an ineffective-assistance case. *Premo* v. *Moore*, 562 U.S. 115, 131 (2011). And *Walker* cited *Premo* for the proposition that cases addressing substantive constitutional rights "simply did not confront ineffective assistance of counsel claims" involving those rights for purposes of habeas claims under AEDPA. *Walker* v. *Martel*, 709 F.3d 925, 940 (9th Cir. 2013).

It is no answer to say (as the United States does, Br. 25) that the government bears the burden under *Chapman*, whereas "the tables are turned" under *Strickland*. First, that argument accepts as given the troubling conclusion that the second constitutional injury makes the first constitutional injury unreviewable, and vice-versa. Second, this Court has shown little tolerance for so unfair a rule. As it explained in *Mickens* v. *Taylor*, 535 U.S. 162 (2002), for example, "an automatic reversal rule" in favor of the *defendant* is "justified" under *Strickland* when defense counsel engages in "joint representation of conflicting interests" in large part because "it [is] difficult to measure the precise harm arising from counsel's errors." *Id.* at 168 (citing *Holloway* v. *Arkansas*, 435 U.S. 475, 489-490 (1978)). *Mickens* thus reflects the common-sense conclusion that the Sixth Amendment—designed as it is to protect the accused—does not impose impossible burdens on defendants.

This Court has also expressed openness to presuming prejudice under the plain error standard (where the burden likewise is on the defendant) because "structural errors are a very limited class of errors that affect the framework within which the trial proceeds, such that it is often difficult to assess the effect of the error." *Marcus*, 560 U.S. at 263 (citations and quotation and alteration marks omitted). Accord *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004) (assuming structural errors necessarily affect substantial rights under Rule 52). No less can be said in the *Strickland* context.

4. The Commonwealth makes the stunning assertion that "[t]his Court has never held that the characteristics of a public-trial violation are such that prejudice is presumed and its impact may never be assessed." Resp. Br. 45. In fact, the Court held exactly

that in *Waller*, where it expressly "agree[d]" with the "consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee." *Waller* v. *Georgia*, 467 U.S. 39, 49 (1984). The Court went on to explain that the "benefits of a public trial are frequently intangible, [and] difficult to prove" and thus quoted approvingly from *State* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980): "Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied." 467 U.S. at 50 n.9.

What is more, this Court repeatedly has ranked violations of the public trial right as structural errors. It recently explained:

> We have characterized as "structural" "a very limited class of errors" that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. Errors of this kind include denial of counsel of choice, denial of self-representation, *denial of a public trial*, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt.

United States v. *Davila*, 133 S. Ct. 2139, 2149 (2013) (emphasis added). This was no outlier statement; the Court routinely identifies violation of the public-trial right as a structural error. See, *e.g.*, *Marcus*, 560 U.S. at 263; *Gonzalez-Lopez*, 548 U.S. at 148-149; *Neder*, 527 U.S. at 37; *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997); *Fulminante*, 499 U.S. at 294. And it is precisely the point of a structural error that it "str[ikes] at fundamental values of our society and 'undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.'" *Fulminante*, 499 U.S. at 294.

5. The Commonwealth takes the equally astonishing position that courtroom closures during jury empanelment are not violations of the public trial right at all because, in such cases, the "courtroom [is] filled with members of the general public in the form of prospective jurors." Resp. Br. 50. Thus, as the Commonwealth sees it, "[d]uring jury selection at [petitioner's] trial, the courtroom was not free from the watchful eye of the public; rather, a large group of prospective jurors was there to observe." *Id.* at 54.

That assertion is flatly contradicted by this Court's decision in *Presley*, which involved identical circumstances: The gallery was closed because it was overcrowded with members of the jury venire. The Court there summarily dispensed with the State's argument that no closure had taken place within the meaning of the Sixth Amendment: "exclusion of the public at juror *voir dire*" is a clear violation of the Sixth Amendment public trial guarantee. *Presley* v. *Georgia*, 558 U.S. 209, 214 (2010). The Commonwealth cannot avoid that clear holding with wordplay, characterizing the venire panel as "the public."[2]

6. Resisting our assertion that a new trial would necessarily be required in this case and others, the Commonwealth observes that "structural errors have been remedied in different ways," pointing in particular to *Waller*. Resp. Br. 37.

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[2] Notwithstanding *Presley*, the Commonwealth complains of a "lack of clarity" surrounding the definition of structural errors. Resp. Br. 34-35. Even supposing this concern had merit (it does not), it would not be unique to the ineffective-assistance context. The Commonwealth cites no evidence that the purported lack of clarity has been unmanageable in other contexts where the structural nature of an error is relevant, such as direct appellate review, where reversals for structural errors are automatic.

True enough, the Court in *Waller* did not remand for an automatic new trial. Because the courtroom was closed in that case only for a suppression hearing, the Court sensibly remanded for an automatic new suppression hearing. It makes sense in that context that the Court would permit the lower courts to determine in the first instance what additional relief may have been warranted based on the outcome of the new hearing. Despite the Commonwealth's contrary suggestion (Resp. Br. 45), the Court's approach in *Waller* was not akin to a prejudice requirement—the Court ordered a new suppression hearing without regard for actual prejudice.

The analogy in this case would be a remand for a new jury empanelment; of course, a new jury necessarily would require a new trial. That was the ultimate outcome in *Presley*: "Because the trial court erred in excluding spectators from voir dire without considering alternatives to closure, Presley is entitled to a new trial." *Presley* v. *State*, 706 S.E.2d 103, 104 (Ga. Ct. App. 2011).

C. Interest in finality is not a sufficient basis for denying relief when an attorney's deficiency results in structural error

Like the Supreme Judicial Court below, the Commonwealth and its amici assert that a decision in petitioner's favor would undermine the States' interest in the finality of criminal judgments. None of its contentions is persuasive.

1. The Commonwealth asserts that inflexible application of *Strickland*'s prejudice requirement is necessary to discourage "sandbagging" trial courts with later claims of ineffective assistance. Resp. Br. 29-30. The amici States similarly postulate that "defense

counsel will have strong incentive *not* to object contemporaneously if that failure to object is deemed *per se* prejudicial." Amici States' Br. 10.

That makes no sense. The nub of petitioner's claim is that his lawyer was ignorant of his public-trial right and thus provided deficient performance by failing to object. It should go without saying that a lawyer who is ignorant of a constitutional right cannot deliberately sandbag a court by *knowingly* declining to raise it at trial. The Commonwealth's concern for sandbagging thus rests on the startling assumption that defense lawyers will lie to establish their own feigned incompetence, claiming that they were ignorant of a right of which they were actually aware. The Commonwealth's concern is exceedingly unlikely to come to pass; few lawyers would be willing to make material misrepresentations of that sort under any circumstance, much less for the purpose of establishing their own made-up deficiencies. An imaginary concern, supported by neither evidence nor common sense, is no basis for denying relief for a violation of the Constitution.

As for those circumstances where defense counsel waive or forfeit the public-trial right for tactical reasons, *Strickland*'s first prong would almost always bar relief. That is, courts' respect for the "wide latitude counsel must have in making tactical decisions" (466 U.S. at 689) will effectively filter out cases where strategic decisions were made. See BIO 25-26 (collecting cases). That is especially so in federal collateral attacks on state-court convictions, where the federal courts must be "doubly deferential," taking "a 'highly deferential' look at counsel's performance through the 'deferential lens of § 2254(d).'" *Cullen* v. *Pinholster*, 563 U.S. 170, 190 (2011).

2. The Commonwealth and its amici speculate that adoption of the rule that we advocate would mean a substantial curtailment of the finality interests protected by procedural default rules and "other claim-processing rules that call for prejudice to be shown." Resp. Br. 26-28. Accord Amici States' Br. 30-32. These concerns are overblown.

We acknowledge that "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011). But *Strickland*'s central premise is that finality interests must yield when an attorney error "threaten[s] the integrity of the very adversary process the right to counsel is meant to serve." *Ibid.* And in no circumstance is the integrity of a criminal trial more starkly undermined than when an attorney's deficiency results in a structural error, the "touchstone" of which is "fundamental unfairness and unreliability." *Gonzalez-Lopez*, 548 U.S. at 159 (Alito, J., dissenting).

We explained, moreover, that cases in which relief is granted under the rule we advocate would be rare (Opening Br. 33-34), for two reasons. First, the lower courts can be trusted to apply *Strickland*'s first prong with care, and "the standard for judging counsel's representation is a most deferential one." *Harrington*, 562 U.S. at 105. Thus defendants will not often pass *Strickland*'s first prong—an observation with which the Commonwealth does not disagree.

The United States' concern (Br. 30) that defendants seeking habeas relief may evade the cause-and-prejudice requirements under Sections 2254 and 2255 "by merely dressing th[e] claim in ineffective assistance garb and asserting that prejudice must be presumed" is therefore misplaced. Raising an ineffective-assistance

claim is no mere pleading trick. As the United States admits (*ibid.*), "a *Strickland* claim requires a showing of deficient performance, which is a high hurdle." That high hurdle will prevent defendants from simplistically "funneling" their claims through *Strickland*.[3]

Second, structural errors are themselves highly unusual; very few rights are structural in nature, and given their conspicuous impact on the framework of the trial, those rights are rarely violated. That is especially so with respect to public-trial violations like the one at issue here. As the Massachusetts Association of Criminal Defense Lawyers confirms (Amicus Br. 7), courts are now well aware that courtroom closures during jury selection violate the Sixth Amendment. And the practice of closing courtrooms ended long enough ago that few, if any, criminal defendants will be waiting in the wings with new collateral challenges; nearly all such challenges will by now be barred by statutes of limitations and rules against second or successive collateral challenges. See *id.* at 5-6.

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[3] We do not concede that the cause-and-prejudice requirement for federal habeas relief is not satisfied by a showing of structural error. *Francis* v. *Henderson*, 425 U.S. 536 (1976), predates both *Fulminante* and *Strickland*. More recently, in *Murray* v. *Carrier*, 477 U.S. 478 (1986), the Court explained that the hallmark of cause-and-prejudice is "a showing that the prisoner was denied 'fundamental fairness' at trial," thus "infecting [the] entire trial with error of constitutional dimensions." *Id.* at 494. That is a perfect description of structural error. Thus, at least two courts of appeals have presumed prejudice for purposes of the cause-and-prejudice requirement. See *United States* v. *Withers*, 638 F.3d 1055, 1066 (9th Cir. 2011) (in a courtroom closure case, citing *Murray* and holding that "[a] structural error would likely satisfy the prejudice showing"); *Owens* v. *United States*, 483 F.3d 48, 64 & n.13 (1st Cir. 2007) (presuming prejudice "to excuse [the defendant's] procedural default on the public trial claim").

In this respect, it bears emphasis that the rule we advocate would have no effect on the majority of procedural rules applicable to *Strickland* claims raised on collateral review. State courts will retain leeway to deny new trials when defendants bring second or successive collateral attacks, when they file petitions for collateral review out of time, and when they otherwise fail diligently to protect their rights as required by state procedural rules. Here, just as in *Waller*, the state courts will thus remain free "[to] determine on remand whether [petitioner is] procedurally barred from seeking relief as a matter of state law." Resp. Br. 27 (quoting *Waller*). What the state courts may *not* do, we submit, is deny relief under the Sixth Amendment for the *substantive* reason that a defendant has failed to prove actual prejudice resulting from a structural error.

3. Invoking the contemporaneous-objection rule, the Commonwealth asserts that finality concerns are especially acute in this case because "the trial judge was never made aware of the spectators' exclusion" from the courtroom and "thus was unable to address the potential error at a point when it could have been remedied without causing disruption or substantially burdening any party." Resp. Br. 1. It thus repeatedly cites the contemporaneous-objection rule as a basis for affirming the lower court. *E.g.*, *id.* at 11, 25, 28-29. This resort to the contemporaneous-objection rule is deeply misplaced.

First, the record is clear that the trial judge *was* aware of the exclusion of the public—the prosecutor brought to the court's attention the presence of the excluded members of the public outside the courtroom. Pet. App. 45a. And every indication is that the judge himself ordered the closure; after all, it was a court

officer who closed and guarded the courtroom doors. JA27-28. It is also fair to say that the court itself is "responsible for creating a situation which resulted in the impairment of [the] right[]" because "the manner in which the parties accepted the [error] indicates that they thought they were acceding to the wishes of the court." *Glasser* v. *United States*, 315 U.S. 60, 71-72 (1942) (appointment of conflicted counsel). See Pet. App. 45a-46a.[4]

More fundamentally, the right to a public trial is protected in the first instance by judges' independent responsibility to manage their courtrooms consistent with constitutional mandates. *E.g.*, *Negron-Sostre*, 790 F.3d at 306 ("[T]he ultimate responsibility of avoiding 'even the appearance that our nation's courtrooms are closed or inaccessible to the public' lies with the judge."). Thus, "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," regardless of whether or not the parties object or propose any particular alternatives to closure. *Presley*, 558 U.S. at 214-215. Because closed trials are wholly within the power and responsibility of the court to prevent, the values protected by the contemporaneous-objection rule are attenuated at best in this case.[5]

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[4] Moreover, petitioner was "unaware of his right to a public trial, [and] did not intentionally waive this right" at the trial. Pet. App. 62a. Petitioner raised his ineffective-assistance claim at the earliest possible opportunity, on direct appeal before the Supreme Judicial Court of Massachusetts.

[5] This conclusion is not limited to public-trial violations. At the most basic level, "the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused" rests foremost "[u]pon the trial judge." *Glasser*, 315 U.S. at 71. Thus, "the primary responsibility for protecting the right to *trial by jury* rests on trial judges and prosecutors." *United States* v. *Garrett*,

5. While the Commonwealth does not deny that courtroom closures erode the public's confidence in the judiciary, or that the public confidence is especially undermined where the rationale for allowing a closure to stand is the incompetence of the defendant's court-appointed lawyer, it asserts that "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Resp. Br. 17-18 (quoting *Johnson*, 520 U.S. at 470). But as we already have shown, concern for finality is limited as a practical matter because of the rarity of attorney incompetence and structural errors, and in any event diminished by the presence of fundamental unfairness. *Johnson*, which did not involve a structural error or an ineffective-assistance claim, does not suggest otherwise.

* * * * *

As we explained in the opening brief, the question presented in the petition calls to mind the elementary-school adage that two wrongs do not make a right. Petitioner here suffered two wrongs: a courtroom closure and a court-appointed defense lawyer too ignorant to know to object. Under the rule proposed by the Commonwealth, putting the two wrongs together means that petitioner gets no relief, in contravention of one of the oldest and most basic Anglo-American legal norm. See *Ashby* v. *White*, 92 Eng. Rep. 126, 135 (Q.B. 1703) (a party with a right "must of necessity have a means to vindicate and maintain it").

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727 F.2d 1003, 1013 (11th Cir. 1984) (emphasis added). And judges bear a personal obligation to assure their own impartiality. See, *e.g.*, *Williams* v. *Pennsylvania*, 136 S. Ct. 1899, 1908 (2016) (detailing rules of professional conduct requiring judges to recuse when "the judge's impartiality might reasonably be questioned").

This Court should not countenance such a result. The lower court's lose-lose logic is inconsistent with core constitutional values, offends *Strickland*'s instruction to focus on fundamental fairness, and undermines the integrity and reputation of the criminal justice system. It should be rejected.

CONCLUSION

The judgment below should be reversed, and the case should be remanded with instructions to grant petitioner a new trial.

Respectfully submitted.

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* The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

RECORD AND BRIEF

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KENTEL MYRONE WEAVER, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a defendant who asserts a claim of ineffective assistance of trial counsel in failing to raise an objection that, if preserved, would constitute structural error must show prejudice in order to establish a violation of *Strickland* v. *Washington*, 466 U.S. 668 (1984).

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In the Supreme Court of the United States

No. 16-240

KENTEL MYRONE WEAVER, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a case-specific showing of prejudice is required to establish ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), where defense counsel rendered deficient performance in failing to object to an error that would be structural on direct appeal. Because this Court's resolution of that question will affect federal criminal proceedings involving the same issue, the United States has a substantial interest in this case.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

Following a jury trial in the Superior Court of Massachusetts, petitioner was convicted of first-degree murder, in violation of Mass. Gen. Laws. ch. 265, § 1 (2016); and possession of a firearm without a license, in violation of Mass. Gen. Laws ch. 269, § 10(a) (2002). Pet. App. 42a. The trial court sentenced petitioner to life imprisonment on the murder charge and a concurrent term of one year to one year and one day of imprisonment on the firearm charge. *Ibid.*; J.A. 88. Five years after his conviction, petitioner moved for a new trial on the ground that his Sixth Amendment right to the effective assistance of counsel was violated when his attorney failed to object to the closure of the courtroom during jury selection. Pet. App. 1a-2a; see *Presley* v. *Georgia*, 558 U.S. 209, 213-215 (2010) (per curiam). The trial court denied relief. Pet. App. 42a-65a. The Supreme Judicial Court of Massachusetts affirmed. *Id.* at 1a-41a.

1. On August 10, 2003, 15-year-old Germaine Rucker went to Wendover Street in Boston, Massachusetts, to sell jewelry to a woman and her children. After buying jewelry from Rucker, the woman reentered her home and heard two gunshots. When she stepped back outside, she saw Rucker lying in the street on top of his bicycle. The woman's daughter had stayed outside. Just before the shooting, she saw

a group of males gathered at the corner of Dudley and Wendover Streets. The group rushed toward Rucker and began to fight with him. The daughter ran up the steps to her front door and heard two gunshots. Pet. App. 1a-3a.

A witness who lived nearby on Humphreys Street was sitting on his second-floor front porch when he heard gunshots from the direction of Wendover Street. He saw a young man run down Humphreys Street wearing dark jeans and trying to pull off one of his shirts. The young man stumbled and pulled a pistol with a flat handle and a long silver barrel from his pants leg. As this happened, a white baseball cap fell off the young man's head. Pet. App. 3a.

A ballistics expert concluded that the shell fragments recovered from Rucker's head and body were fired by a revolver, consistent with the witness's description of the gun carried by the young man seen running down Humphreys Street. The police retrieved the white baseball cap that had fallen from the suspect's head, and the hatband contained DNA that matched petitioner's profile. Pet. App. 3a-4a. The police also recognized the distinctive hat (a Detroit Tigers cap with airbrushed "Ds" on the sides) as belonging to petitioner from previous interactions with him. *Id.* at 3a, 12a. Petitioner confessed—first to his mother and then to the police—that he had shot Rucker. *Id.* at 1a, 15a-16a.

2. A grand jury in Suffolk County, Massachusetts, returned an indictment charging petitioner with first-degree murder, in violation of Mass. Gen. Laws ch. 265, § 1 (2016); and possession of a firearm without a license, in violation of Mass. Gen. Laws ch. 269, § 10(a) (2002). J.A. 94; see Pet. App. 1a.

At the beginning of trial, the trial court assembled a venire of approximately 90 people. Pet. App. 43a. The courtroom was "not quite large enough to accommodate everyone," forcing some prospective jurors to move into the hallway "to wait for open seats" after the judge gave initial instructions to everyone in the courtroom. *Id.* at 43a-44a (citation omitted). Petitioner's mother and other interested persons sought entry into the courtroom, but a court security officer explained that the courtroom was "closed for jury selection." *Id.* at 48a. At the end of the day, petitioner's mother told his counsel that she had been denied entry into the courtroom. *Id.* at 49a. Counsel did not object and later testified that he "believed that a courtroom closure for empanelment was constitutional and that an objection would [have been] futile." *Ibid.*

Jury selection continued into a second day, with venire members again waiting in the hallway because of crowding in the courtroom. Pet. App. 44a-45a. Petitioner's mother and another interested individual also were present at the courthouse on the second day of jury selection and were again told by a court officer not to enter the courtroom. *Id.* at 50a.

The case proceeded to trial. Having unsuccessfully moved to suppress petitioner's confession, the defense strategy at trial was to argue that petitioner's confession was involuntary and the result of coercion due to lengthy questioning by the police and petitioner's mother. Pet. App. 1a, 4a, 28a. On April 26, 2006, the jury found petitioner guilty on both counts. *Id.* at 5a, 42a. The trial court sentenced petitioner to life imprisonment on the murder charge and a concurrent term of one year to one year and one day of imprisonment on the firearm charge. *Id.* at 42a; J.A. 88.

3. In 2011, five years after the trial was complete, petitioner filed a motion for a new trial on the ground that, *inter alia*, his counsel provided ineffective assistance by failing to object to the closure of the courtroom during jury selection. Pet. App. 1a-2a, 38a. The trial court denied the motion. *Id.* at 42a-65a.

The trial court explained that "[t]he right to a public trial, granted by the Sixth Amendment[,] * * * extends to pretrial proceedings, including jury selection." Pet. App. 54a (citing *Presley*, 558 U.S. at 211-213). The court further explained that the right to a public trial is not absolute and that a court may exclude the public from the courtroom "[only for cause shown] that outweighs the value of openness." *Ibid.* (quoting *Press-Enter. Co.* v. *Superior Court*, 464 U.S. 501, 509 (1984)). After an evidentiary hearing, the trial court found that a court security officer had fully closed the courtroom to petitioner's family and the public due to the crowded conditions. Pet. App. 53a, 55a-57a; see *id.* at 38a-39a. The court concluded that those conditions did not justify closing the courtroom under the criteria announced in *Waller* v. *Georgia*, 467 U.S. 39 (1984). Pet. App. 58a-60a.[1]

The trial court concluded that counsel's failure to object to the closure "stemm[ed] from a misunderstanding of the law governing [petitioner's] right to a

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[1] The factors set out in *Waller*, the trial court explained, are (1) whether the party seeking to close the hearing can advance an overriding interest that is likely to be prejudiced; (2) whether the closure is no broader than necessary to protect that interest; (3) whether the trial court considered reasonable alternatives to closing the proceedings; and (4) whether the trial court made findings adequate to support the closure. Pet. App. 58a (citing *Waller*, 467 U.S. at 48).

public trial"; was "the product of 'serious incompetency, inefficiency, or inattention' to [petitioner's] Sixth Amendment right to a public trial"; and "was not objectively reasonable." Pet. App. 63a (citation omitted). The court further concluded, however, that counsel's performance did not cause prejudice warranting a new trial. *Id.* at 64a. The court noted that "violation of the right to a public trial is structural error" and that a defendant who has preserved such an error therefore "need not show prejudice to obtain a new trial." *Id.* at 54a-55a (citing *Commonwealth* v. *Downey*, 78 Mass. App. Ct. 224, 229, review denied, 458 Mass. 1110 (2010)). The court acknowledged that because defense counsel did not object to the courtroom closure, "[petitioner] is prejudiced in the sense that he cannot now claim the benefit of the presumption of prejudice from the structural error that occurred during the empanelment." *Id.* at 64a. The court concluded, however, that "prejudice must flow from a source other than the waiver itself," and it denied relief because "[petitioner] ha[d] not offered any evidence or legal argument establishing prejudice." *Ibid.*

4. The Supreme Judicial Court of Massachusetts consolidated petitioner's appeal of the denial of his new trial motion with his pending direct appeal and affirmed. Pet. App. 1a-41a. As relevant here, the court explained that "[a] violation of the Sixth Amendment right to a public trial constitutes structural error" and that "[w]here a meritorious claim of structural error is timely raised, the court presumes prejudice, and reversal is automatic." *Id.* at 39a (internal citations, quotation marks, and emphasis omitted). The court further explained, however, that

where a "defendant has procedurally waived his Sixth Amendment public trial claim by not raising it at trial, and later raises the claim as one of ineffective assistance of counsel in a collateral attack on his conviction, the defendant is required to show prejudice from counsel's inadequate performance (that is, a substantial risk of a miscarriage of justice) and the presumption of prejudice that would otherwise apply to a preserved claim of structural error does not apply." *Id.* at 40a (quoting *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1104 (Mass. 2014), cert. denied, 136 S. Ct. 317 (2015) (emphasis omitted)). Because petitioner did "not advance[] any argument or demonstrate[] any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice," the court held that petitioner was not entitled to relief. *Id.* at 40a-41a.

SUMMARY OF ARGUMENT

A. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that legal representation violates the Sixth Amendment if counsel's performance falls below an objective standard of reasonableness and the defendant suffers prejudice as a result. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The prejudice component of *Strickland* reflects the purpose of the Sixth Amendment guarantee of counsel, which is to ensure that the defendant has the assistance of counsel necessary to justify reliance on the proceeding.

B. The Court has dispensed with a showing of prejudice in situations of actual or constructive denial of counsel on the ground that prejudice in those cir-

cumstances "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. The Court has also recognized a limited presumption of prejudice where counsel is burdened by a conflict of interest arising from multiple concurrent representation, and the defendant can show that an actual conflict of interest adversely affected his lawyer's performance. In contrast to the above situations, none of which exists in petitioner's case, when counsel is present and no external circumstances constrain his performance, a defendant alleging that his counsel was constitutionally ineffective must show prejudice under *Strickland*.

C. Petitioner contends that the Court should dispense with *Strickland*'s prejudice requirement in cases where counsel's deficient performance results in a structural error, *i.e.*, an error not requiring a showing of prejudice if preserved and raised on direct appeal. That departure from *Strickland*'s prejudice requirement is unwarranted.

The occurrence of a structural error does not create circumstances similar to other scenarios where the Court has dispensed with a showing of prejudice. For example, courts conducting *Strickland* prejudice analysis have recognized that structural errors do not categorically lead to unreliable trial outcomes where the error caused by counsel's deficient performance is the denial of an impartial judge or the use of race-based peremptory strikes during jury selection. Petitioner's case, in which spectators were excluded from the courtroom during jury selection, illustrates that structural errors do not inevitably create circumstances where a different trial outcome is so likely that litigating prejudice case by case is unjustified.

Nor does the difficulty of proving the effect of a structural error justify dispensing with a showing of prejudice under *Strickland*. On direct appeal, a preserved claim of structural error results in automatic reversal without regard to the effect of the error on the outcome of trial. In that context, the court has already found a constitutional error, and the difficulty of proving the effect of the error leaves the government unable to satisfy its burden of showing the error was harmless beyond a reasonable doubt. But where counsel fails to raise a timely objection and the defendant later attempts to obtain relief for the structural error through an ineffective-assistance claim, the defendant has the burden to show prejudice as a necessary component of completing his Sixth Amendment claim. Identifying the effect of a structural error may be difficult, but if no reasonable likelihood exists that an objection would have changed the outcome of trial, then the defendant has suffered no unfairness that is protected by the Sixth Amendment right he asserts.

Strickland's guidance on how to conduct a case-specific prejudice analysis is flexible enough to encompass consideration of attorney errors that result in structural defects. Structural errors, including violation of the public-trial right, come in all shapes and sizes, and courts can consider prejudice to the defendant in a specific case based on the strength of the evidence supporting the verdict and whether the effect of the error was pervasive or isolated.

D. If the Court were to dispense with *Strickland*'s prejudice requirement in the case of structural errors, defendants would be able to evade procedural rules governing contemporaneous objections and to instead

raise ineffective-assistance claims in collateral proceedings where the judge and the prosecutor no longer have the ability to quickly remedy the perceived structural error. Dispensing with *Strickland*'s prejudice requirement would also undermine society's legitimate interest in the finality of judgments.

ARGUMENT

PETITIONER MUST SHOW THAT COUNSEL'S FAILURE TO OBJECT TO THE COURTROOM CLOSURE DURING JURY SELECTION PREJUDICED HIS DEFENSE

A. The Sixth Amendment's Guarantee Of Effective Assistance Of Counsel Is Offended Only Where The Criminal Defendant Suffers Prejudice From Counsel's Deficient Performance

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that "'legal representation violates the Sixth Amendment if it falls 'below an objective standard of reasonableness,' as indicated by 'prevailing professional norms,' and the defendant suffers prejudice as a result." *Chaidez* v. *United States*, 133 S. Ct. 1103, 1107 (2013) (quoting *Strickland*, 466 U.S. at 688). To establish prejudice, the "defendant must show * * * a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* Where, as here, a criminal defendant challenges his convictions, the defendant satisfies that standard by showing that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

"It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Otherwise, "[v]irtually every act or omission of counsel would meet th[e] test," and "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Ibid.* Nor does the defendant need to show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Ibid.* Instead, the defendant's proof must "undermine confidence in the outcome" by demonstrating that an objectively "reasonabl[e], conscientious[], and impartial[]" decisionmaker might well have reached "a result more favorable to the defendant" absent counsel's error. *Id.* at 694-695. "[T]he ultimate focus of inquiry," the Court emphasized, "must be on the fundamental fairness of the proceeding whose result is being challenged," *id.* at 696, as informed by the objective merits of the defense strategy that counsel's errors foreclosed, see *id.* at 694-695.

The prejudice component reflects "[t]he purpose of the Sixth Amendment guarantee of counsel," which is to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 691-692. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. As this Court has explained, given the "purpose" of "the right to effective representation"—to "ensur[e] a fair trial"—"[c]ounsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they

have)." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

B. The Court Has Dispensed With A Requirement Of Showing Prejudice Only In Very Limited Circumstances That Are Not Present In Petitioner's Case

1. Because counsel is presumed to be "competent to provide the guiding hand that the defendant needs," the burden rests on the defendant to show that his right to effective assistance of counsel has been violated. *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). The Court has dispensed with a showing of prejudice in situations of actual or constructive denial of counsel or a conflict of interest arising from multiple concurrent representation. But absent those circumstances, when counsel is present and no external circumstances constrain his performance, a defendant alleging that his counsel was constitutionally ineffective must show prejudice under *Strickland*.

a. The Court has concluded that a defendant is not required to show prejudice when he has been actually or constructively denied the assistance of counsel at a critical stage of trial. *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 659 & n.25 (citing, *e.g.*, *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961) (capital defendant was denied counsel at arraignment); *Williams* v. *Kaiser*, 323 U.S. 471, 474-476 (1945) (court accepted defendant's guilty plea after denying his request for counsel)). "[V]arious kinds of state interference with counsel[]" are also "legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 659 n.25 (citing, *e.g.*, *Geders* v. *United States*, 425 U.S. 80, 91 (1976) (court prohibited defendant from consulting his counsel about anything during a 17-hour overnight recess in the trial between

his direct and cross-examination); *Herring* v. *New York*, 422 U.S. 853, 863-865 (1975) (court denied defense counsel the opportunity make a summation of evidence)). And no showing of prejudice is required where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

The Court has dispensed with a showing of prejudice in those circumstances on the ground that "[p]rejudice * * * is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692; see *Cronic*, 466 U.S. at 658 (circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). Where the defendant is denied counsel or the State interferes with counsel's assistance, the presumption of prejudice arises from the principle that "counsel's assistance is essential," and the absence of counsel thus "requires [a court] to conclude that a trial is unfair." *Cronic*, 466 U.S. at 659. And where counsel fails to subject the government's case to meaningful adversarial testing, the presumption is justified because that type of total breakdown in the role of counsel makes "the adversary process itself presumptively unreliable." *Ibid.*

b. The Court has also recognized a "similar, though more limited, presumption of prejudice" in cases where counsel was "burdened by an actual conflict of interest." *Strickland*, 466 U.S. at 692 (citing *Cuyler* v. *Sullivan*, 446 U.S. 335, 348-350 (1980)). A limited presumption is justified in those circumstances, the Court has explained, because counsel has "breache[d] the duty of loyalty, perhaps the most basic of counsel's duties," *ibid.*, and because of "the high probability of

prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice," *Mickens* v. *Taylor*, 535 U.S. 162, 175 (2002). A conflict of interest does not create a *per se* rule of prejudice. Rather, "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692 (quoting *Cuyler*, 446 U.S. at 350).

c. The Court identified the above categories in the process of defining ineffective assistance of counsel. Those categories of pervasive or fundamental denials of counsel, however, are distinct from ineffective-assistance claims targeting specific areas of attorney performance. See *Perry* v. *Leeke*, 488 U.S. 272, 279-280 (1989) (explaining that the Court's discussion in *Strickland* of denial-of-counsel cases was "intended to make clear that '[a]ctual or constructive denial of the assistance of counsel altogether' * * * is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective.") (brackets in original) (quoting *Strickland*, 466 U.S. at 692). In contrast to claims of actual or constructive denial of counsel, ineffective-assistance claims "alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. "Even if a defendant shows that particular errors of counsel were unreasonable," the Court explained, "the defendant must show that they actually had an adverse effect on the defense." *Ibid.*

2. Petitioner's ineffective-assistance claim does not fall within any of the categories recognized in *Strickland* where no showing of prejudice is required. Petitioner's counsel was present for the entire proceeding and no external circumstances constrained his advocacy. Nor did counsel "entirely fail[] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Defense counsel was "a very experienced and highly regarded defense attorney" who had handled more than 100 murder trials. Pet. App. 27a-28a. His deficient performance occurred at a single point—during jury selection—and not throughout the entire trial. As the Court explained in *Bell* v. *Cone*, 535 U.S. 685 (2002), "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." *Id.* at 696-697. And, finally, petitioner does not contend that his trial counsel was burdened by any conflict of interest that would trigger the more limited presumption of prejudice recognized in *Cuyler*. See *Strickland*, 466 U.S. at 692.

C. The Court Should Not Dispense With *Strickland*'s Prejudice Requirement Where Counsel's Deficient Performance Results In A Structural Error

Petitioner contends (Br. 20-26) that the Court should dispense with *Strickland*'s prejudice requirement in cases where counsel's deficient performance results in a structural error, *i.e.*, an error not requiring a showing of prejudice if preserved and raised on direct appeal. He contends (*ibid.*) that a presumption of unreliability—akin to a *Cronic* error—should arise in those circumstances and that he therefore should be relieved of showing prejudice in this case, where

his attorney's error resulted in a violation of the public-trial right. That departure from *Strickland*'s prejudice requirement is unwarranted.

1. Deficient attorney performance that results in structural error does not necessarily undermine the reliability of the trial outcome

In arguing for an exemption from *Strickland*'s prejudice requirement, petitioner relies on cases (Br. 21-25) in which this Court has described structural errors in general as violations of constitutional protections without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (citation omitted); *Neder* v. *United States*, 527 U.S. 1, 8-9 (1999) (citation omitted); see *Sullivan* v. *Louisiana*, 508 U.S. 275, 281-282 (1993). The occurrence of a structural error, however, does not create circumstances similar to other scenarios where the Court has dispensed with a showing of prejudice, *i.e.*, circumstances that are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658.

a. The Court has distinguished between two types of constitutional errors. A "trial error" is a discrete error that "occur[s] during [the] presentation of the case to the jury." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 307). A "'structural' error," on the other hand, refers to a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (quoting *Fulminante*, 499 U.S. at 310). The Court "ha[s] found structural errors only in a very limited class of cases,"

ibid., in which it is typically "difficult to assess the effect of the error," *United States* v. *Marcus*, 560 U.S. 258, 263 (2010) (brackets and internal quotation marks omitted) (quoting *Gonzalez-Lopez*, 548 U.S. at 149 n.4).

Constitutional trial defects found by this Court to be structural errors include: a total deprivation of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); the denial of an impartial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); the denial of a defendant's right to represent himself at trial, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); a violation of a defendant's right to a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); racial discrimination in the selection of the grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); an erroneous instruction on reasonable doubt that affected all of a jury's findings, see *Sullivan*, 508 U.S. at 275; and the denial of the right to be represented by retained counsel of choice, see *Gonzalez-Lopez*, 548 U.S. at 150. See *Marcus*, 560 U.S. at 263-264; *Gonzalez-Lopez*, 548 U.S. at 149-150; *Neder*, 527 U.S. at 8; *Johnson*, 520 U.S. at 468-469; see also *Williams* v. *Pennsylvania*, 136 S. Ct. 1899 (2016) (participation of a biased judge on a multi-member panel); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion) (appointment of an interested party as contempt prosecutor). The Court has also recognized a non-constitutional structural error where a magistrate judge presides over jury selection in a felony trial over the defendant's objection. See *Gomez* v. *United States*, 490 U.S. 858, 873-875 (1989).

b. Courts conducting *Strickland* prejudice analysis have recognized that structural errors do not categor-

ically lead to unreliable trial outcomes but can be analyzed for case-specific prejudice.[2] For example, the Eleventh Circuit found no reasonable probability of a different trial outcome in a case where a judge had conducted a "private investigation[]" into extra-record and *ex parte* materials, because the jury "never had access to information beyond the record" and the judge's consideration of additional materials did not "alter[] the strong evidence pointing to [the defendant's] culpability." *Vining* v. *Secretary*, 610 F.3d 568, 574-575 (2010), cert. denied, 563 U.S. 977 (2011). The Third Circuit, in contrast, found a reasonable probability that counsel's failure to request recusal of a biased trial judge affected the outcome of the trial where the judge conducted a bench trial and "[t]here [wa]s evidence in the record from which an impartial judge could have found a lesser degree of homicide." *McKernan* v. *Superintendent Smithfield SCI*, 849 F.3d 557, 567 (2017).

The Eighth Circuit has concluded that defense counsel's failure to object to a prosecutor's race-based peremptory strikes of jurors did not constitute ineffective assistance because the defendant had "not shown a reasonable probability that the results of the proceeding would have been different" had counsel objected and the African American jurors been seat-

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[2] As the Court has recognized, trial errors may be classified as structural for a variety of reasons, including the difficulty of assessing the error; fundamental unfairness caused by the error; or "the irrelevance of harmlessness," such as in cases where the defendant has been denied the right to self-representation—a right that, when exercised, usually increases the likelihood of an undesirable trial outcome. *Gonzalez-Lopez*, 548 U.S. at 149 n.4. Structural errors do not "*always* or *necessarily* render a trial fundamentally unfair and unreliable." *Ibid.*

ed. *Young* v. *Bowersox*, 161 F.3d 1159, 1161 (1998), cert. denied, 528 U.S. 880 (1999). The court explained that if the jurors who were seated were impartial, then no reasonable probability of a different trial outcome existed had the violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), not occurred. *Bowersox*, 161 F.3d at 1161 (citing *Wright* v. *Nix*, 928 F.2d 270, 274 (8th Cir.) (Arnold, J., concurring), cert. denied, 502 U.S. 838 (1991)). The Eleventh Circuit has similarly concluded that, despite counsel's deficient performance in failing to raise an objection, the result of a trial was reliable even though the prosecution had used preemptory strikes to exclude African Americans from the jury. *Jackson* v. *Herring*, 42 F.3d 1350, 1362, cert. dismissed, 515 U.S. 1189 (1995). The court explained that it "would have more confidence in the verdict had it been delivered by a constitutionally composed jury, with both black and white members." *Ibid.* But having conducted a thorough review of the record, the court found no reasonable probability of a different outcome no matter who sat on the jury. *Ibid.*

c. Petitioner's case demonstrates rather clearly that structural errors do not inevitably create circumstances where a different trial outcome is so likely that litigating prejudice in every case is unjustified. The error in petitioner's case does not implicate any of the reasons why closed-courtroom trials are thought to be unreliable mechanisms for determining guilt or innocence. The public-trial right protects against perjury, as witnesses are more likely to tell the truth in a public and solemn tribunal than in a secret proceeding. Pet. Br. 16-17 (citing *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 421 (1979) (opinion of Blackmun, J.)). But that concern is not implicated here. The

courtroom was open to the public during the presentation of evidence to the jury, and no witness testified during jury selection. Public trials also help to ensure the reliability of criminal trials by "induc[ing] unknown witnesses to come forward with relevant testimony." *Id.* at 17 (quoting *Gannett*, 443 U.S. at 382). But again, petitioner's trial was open to the public after the jury was selected and observers had the opportunity to learn about the government's evidence against petitioner and to come forward with any additional information they might have about the crime.

The public-trial right also serves to keep a defendant's "triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (citation omitted); Pet. Br. 17. It is theoretically possible that the exclusion of members of the public from the courtroom during jury selection caused the judge, prosecutor, or potential jurors to be less conscientious or sensitive to the importance of their roles (although that seems highly unlikely given that all seats in the courtroom were filled with members of the community who were observing and participating in the jury selection process). That theoretical possibility is an insufficient foundation on which to ground a claim that, had counsel objected to the closure, a different trial outcome "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. As explained in *Strickland*, "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* at 693.

Petitioner notes (Br. 17-18, 30-32) that the public-trial right also protects the rights of the public by giving the criminal-justice system the appearance of

fairness and by satisfying the community's need to see that justice is being done. Those important underpinnings of the public-trial right have no bearing on a *Strickland* prejudice analysis, which is concerned only with whether counsel's errors affected the jury's guilty verdict. 466 U.S. at 694. Petitioner acknowledges (Br. 17) that these broader societal interests do not protect the accused's right to a fair trial.

***2. The difficulty of proving the effect of a structural error does not justify dispensing with a showing of prejudice under* Strickland**

Petitioner further contends (Br. 26-29) that no showing of case-specific *Strickland* prejudice should be required because the effect of a structural error on a trial is difficult to prove. He notes (Br. 19-20, 27-28) that in the harmless-error context, *i.e.*, the standard used to review preserved claims of structural error on direct appeal, this Court has not conducted a case-specific inquiry into whether the error harmed the defense. The difficulty of proving the effect of structural error does not justify dispensing with a showing of prejudice under *Strickland*.

a. Whether a defect qualifies as "structural error" affects the manner in which an appellate court reviews a defendant's criminal conviction on direct appeal. This Court has explained that "most constitutional errors can be harmless," *Neder*, 527 U.S. at 8 (quoting *Fulminante*, 499 U.S. at 306), meaning that a constitutional error does not justify reversal if the government demonstrates that its influence on the jury's verdict was "harmless beyond a reasonable doubt," *Chapman* v. *California*, 386 U.S. 18, 24 (1967); see *Gonzalez-Lopez*, 548 U.S. at 148; see also Fed. R. Crim. P. 52(a). Structural errors, by contrast, "defy

analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds" and are not "simply an error in the trial process itself." *Gonzalez-Lopez*, 548 U.S. at 148 (quoting *Fulminante*, 499 U.S. at 309-310) (brackets in original).

This Court has described the effect of structural errors as being "unmeasurable," "unquantifiable," and "indeterminate." *Sullivan*, 508 U.S. at 281-282; see *Vasquez*, 474 U.S. at 263-264. Accordingly, on direct appeal, a preserved claim of structural error results in "automatic reversal * * * without regard to [its] effect on the outcome." *Neder*, 527 U.S. at 7.[3]

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[3] The harmless-error standard applies only where the defendant lodged a timely objection at trial, thereby preserving the claim for appellate review. See, *e.g.*, *Neder*, 527 U.S. at 7. If the defendant fails to contemporaneously object, he forfeits the claim and, in federal court, may obtain relief on appeal only by satisfying the rigorous requirements of the plain-error standard. See Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). To warrant relief under that rule, a defendant must establish (1) an error that (2) was "plain," "clear," or "obvious" and (3) "affect[ed] [his] substantial rights." *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993) (citations omitted). If those conditions are met, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002) (quoting *Johnson*, 520 U.S. at 467) (citations omitted; brackets in original).

A defendant seeking to satisfy *Olano*'s third prong "[n]ormally * * * must make a specific showing of prejudice"—that is, a showing that the error "affected the outcome of the district court proceedings." 507 U.S. at 734-735. Since *Olano*, the Court has not exempted any forfeited error from the general rule that a defendant must make a specific showing of actual prejudice to establish an

b. The rule of automatic reversal for structural errors in harmless-error analysis does not justify relieving a defendant from showing actual prejudice under *Strickland*. When a court conducts harmless-error analysis on direct appeal, the court has already concluded that a constitutional error occurred, and the defendant has preserved an objection to that error. *Neder*, 527 U.S. at 7; *Chapman*, 386 U.S. at 24; see *Presley* v. *Georgia*, 558 U.S. 209, 210, 213-215 (2010) (per curiam) (preserved objection to closure of courtroom during voir dire); *Waller*, 467 U.S. at 42, 48-49 & n.9 (preserved objection to closure of courtroom during suppression hearing); cf. *Gonzalez-Lopez*, 548 U.S. at 150 ("A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied."). The question then becomes whether "the State c[an] show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24). The government cannot satisfy that burden in the case of a structural error because "the effect of the violation cannot be ascertained." *Vasquez*, 474 U.S. at 263. The defendant is thus automatically entitled to appropriate relief irrespective of whether he suffered any prejudice from the violation. *Sullivan*, 508 U.S. at 279.

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effect on his substantial rights. The Court has, however, "declined to resolve whether 'structural' errors * * * automatically satisfy th[is] * * * prong of the plain-error test." *Puckett* v. *United States*, 556 U.S. 129, 140 (2009). The Court avoided that question in two cases by concluding that, where the evidence against a defendant is overwhelming, the defendant could not satisfy *Olano*'s fourth prong. *Cotton*, 535 U.S. at 632-633; *Johnson*, 520 U.S. at 469-470.

But where counsel fails to raise a timely objection and the defendant later claims that the failure to object violated his Sixth Amendment guarantee of the effective assistance of counsel, the court must assess whether "a violation of the right to effective representation *occurred*," which requires a showing of prejudice. *Gonzalez-Lopez*, 548 U.S. at 150. "The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation." *Id.* at 147. Accordingly, "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *Ibid.*; *Lockhart* v. *Fretwell*, 506 U.S. 364, 369 n.2 (1993) ("Harmless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed. And under *Strickland* * * *, an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice.").

The difficulty of identifying the effect of a structural error may present challenges for a defendant seeking to establish that his counsel's failure to object to a structural error caused him prejudice. See *Sullivan*, 508 U.S. at 282 (harms from structural errors are often "unquantifiable and indeterminate"). That difficulty will frequently be present where the structural error was a violation of the right to a public trial. See *Waller*, 467 U.S. at 49 n.9 ("[T]he benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance."). But that possibility does not justify relieving criminal defendants of the obligation to demonstrate prejudice in the absence of "circum-

stances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658.

In the case of preserved claims of structural error challenged on direct appeal, the unknown effect on the outcome of trial works against the government, because the government is unable to show that the error was harmless beyond a reasonable doubt. But the tables are turned when the defendant bears the burden of showing prejudice from counsel's deficient performance. There, the difficultly of proving the effect of a structural error may leave the defendant unable to satisfy his burden of proving prejudice. The Court has made clear, however, that in the *Strickland* prejudice analysis, "[i]t is not enough for the defendant to show that [an] error[] had some conceivable effect on the outcome of the proceeding." 466 U.S. at 693.[4]

The prejudice component of *Strickland* serves "[t]he purpose of the Sixth Amendment guarantee of counsel," which is to "ensure that a defendant has the assistance necessary to justify reliance on the out-

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[4] Petitioner skips over this burden-shifting problem by describing the burden in harmless-error analysis as being on the defendant to show that "the violation 'contribute[d] to the verdict obtained.'" Br. 3 (quoting *Sullivan*, 508 U.S. at 279) (brackets in original). He reasons (Br. 28) that because prejudice is presumed for structural errors in that context based on difficulty of proof, prejudice should be presumed under *Strickland* for the same reason. The government, however, has the burden to prove harmlessness in the harmless-error context. See *Sullivan*, 508 U.S. at 279 (question in harmless-error analysis is whether "*the State* c[an] show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'") (citation omitted; emphasis added). The defendant bears the burden to show prejudice under *Strickland*.

come of the proceeding." 466 U.S. at 691-692. If no reasonable likelihood exists that an objection would have changed the outcome of trial, then the defendant has suffered no unfairness that is protected by the Sixth Amendment right he asserts. See *Gonzalez-Lopez*, 548 U.S. at 147.

c. Finally, the Court should reject the premise (Pet. Br. 19-20, 26-29) that it will always be impossible for a defendant to show case-specific prejudice under *Strickland* where a structural error has occurred. *Strickland*'s guidance on how to conduct a case-specific prejudice analysis is flexible enough to encompass consideration of attorney errors that result in structural defects. The Court explained that, in making the case-specific prejudice determination, "a court * * * must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," the Court explained, "and some will have had an isolated, trivial effect." *Id.* at 695-696. And "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. Structural errors appear in a variety of shapes and sizes and can be evaluated on a case-by-case basis using those guidelines.

d. With respect to the public trial right in particular, a trial might be conducted completely in secret; the courtroom may be closed only for jury selection or a pre-trial suppression motion (see *Presley*, 558 U.S. at 213-215; *Waller*, 467 U.S. at 46); or the courtroom may be partially or fully closed during the testimony of one trial witness (see, *e.g.*, *United States* v. *Char-*

boneau, No. 09-cr-7, 2011 WL 5040717, at *5 (D.N.D. 2011) (collecting cases where courtroom was closed to protect sexual assault victims), aff'd, 702 F.3d 1132 (8th Cir. 2013); *Owens* v. *United States*, 483 F.3d 48, 62 (1st Cir. 2007) ("Most justifications for trial closure have involved the need to protect witnesses or maintain courtroom order.") (citing *United States* v. *Sherlock*, 962 F.2d 1349, 1356 (9th Cir.) (collecting cases), cert. denied, 506 U.S. 958 (1992); *Purvis* v. *Crosby*, 451 F.3d 734, 735 (11th Cir.) (courtroom cleared of "most of the public" during victim testimony in a child molestation case), cert. denied, 549 U.S. 1035 (2006); *People* v. *Jones*, 391 N.E.2d 1335, 1337-1338 (N.Y.) (courtroom closed during testimony of undercover police officer), cert. denied, 444 U.S. 946 (1979)). If any such closure is found to be unjustified, courts can consider prejudice to the defendant on a case-by-case basis based on "the totality of the evidence before the judge or jury," whether the error "had a pervasive effect on the inferences to be drawn from the evidence" or instead had only an "isolated" effect, and the strength of the evidence supporting the verdict. *Strickland*, 466 U.S. at 695-696.

D. Petitioner's Proposed Framework Evades Established Rules Governing Waiver And Forfeiture Of Issues Not Presented At Trial

The Court has applied the *Strickland* standard, including its prejudice component, "with scrupulous care" because otherwise "[a]n ineffective-assistance claim can function as a way [for defendants] to escape rules of waiver and forfeiture and raise issues not presented at trial." *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011). Petitioner's call to abandon *Strickland*'s prejudice inquiry in the case of structural er-

rors contravenes that principle by allowing defendants to evade procedural rules governing contemporaneous objections and to instead raise claims in collateral proceedings where the judge and the prosecutor no longer have the ability to quickly remedy the perceived structural error.

1. State prisoners seeking federal habeas review of their convictions under 28 U.S.C. 2254 must generally present their constitutional claims to state courts for resolution. If not, the claims are procedurally defaulted, and federal habeas relief is foreclosed unless the prisoner further demonstrates "cause" for the default and "prejudice" from it. *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000). The same rule of preservation in the trial court applies to federal prisoners seeking post-conviction relief under 28 U.S.C. 2255. See *Bousley* v. *United States*, 523 U.S. 614, 622 (1998).

The Court has held that "prejudice" in this setting means "actual prejudice." *United States* v. *Frady*, 456 U.S. 152, 168 (1982). Federal courts may grant relief only where the procedurally defaulted claim "worked to [the defendant's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170. This standard imposes "a significantly higher hurdle" than would exist had the defendant preserved his claim for review on direct appeal. *Id.* at 166.

Under that framework, a defendant seeking to raise a procedurally defaulted claim of structural error in a post-conviction proceeding must show "actual prejudice" from that error. *Francis* v. *Henderson*, 425 U.S. 536 (1976), illustrates that principle. There, the petitioner had alleged a structural error—namely, that African Americans had been systemati-

cally excluded from the grand jury in his case. See *Vasquez*, 474 U.S. at 262-263. He procedurally defaulted that claim for purposes of federal habeas review because he did not raise any objection before the trial court or the state appellate courts. See *Francis*, 425 U.S. at 537-538. This Court refused to excuse the procedural default. It explained that, "[i]n a collateral attack upon a conviction[,] th[e] rule requires * * * not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of actual prejudice." *Id.* at 542.

The Court in *Francis* recognized that the petitioner could have obtained relief without a showing of prejudice if he had properly preserved and presented his claim challenging the composition of the grand jury to the state courts. But where a claim has not been properly preserved, "[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." 425 U.S. at 542 n.6 (quoting *Davis* v. *United States*, 411 U.S. 233, 245 (1973)).

2. a. The standard for prejudice in a procedural default analysis is at least as onerous for a defendant as the standard for prejudice under *Strickland*. Cf. *Strickler* v. *Greene*, 527 U.S. 263, 282 (1999) (unless undisclosed information is "material" under *Brady* v. *Maryland*, 373 U.S. 83 (1963), suppression could not cause "prejudice" sufficient to overcome procedural default). The Court's refusal to relax the "actual prejudice" condition for structural errors in the pro-

cedural-default setting, *Francis*, 425 U.S. at 542, should apply equally to *Strickland* prejudice.

A contrary result would offer defendants an easy path to "escape rules of waiver and forfeiture." *Harrington*, 562 U.S. at 105. "Any defendant who could not make the prejudice showing necessary to have a defaulted claim of structural error considered could bypass that requirement by merely dressing th[e] claim in ineffective assistance garb and asserting that prejudice must be presumed." *Purvis*, 451 F.3d at 743. It is true that a *Strickland* claim requires a showing of deficient performance, which is a high hurdle. But in cases of obvious structural error, dispensing with a showing of prejudice under *Strickland* would bypass *Francis*, incentivizing defendants to funnel procedurally defaulted structural-error claims into the *Strickland* framework.

b. More fundamentally, the prejudice component of procedural default and *Strickland* advances "society's legitimate interest in the finality of the judgment." *Frady*, 456 U.S. at 164; see *Strickland*, 466 U.S. at 693 (emphasizing "the profound importance of finality in criminal proceedings"). In the criminal justice system, the trial is a "decisive and portentous event" during which "the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). "To the greatest extent possible all issues which bear on th[e] [criminal] charge should be determined in this proceeding." *Ibid.*

Where a defendant contemporaneously objects to a perceived structural error, the trial court can respond immediately. "That court is ordinarily in the best

position to determine the relevant facts and adjudicate the dispute." *Puckett* v. *United States*, 556 U.S. 129, 134 (2009). If no violation is found, the proceedings can continue apace. Alternatively, the court "can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome." *Ibid.* In this case, for instance, had a timely objection to the courtroom closure been lodged, the trial court could have amended its procedures to accommodate the spectators who wished to observe jury selection.

But where the defendant raises a structural-error objection for the first time years later in a post-conviction motion, the costs to the system are significant. Courts cannot necessarily conduct a full inquiry into the facts relevant to the objection. In this case, for example, the trial judge had retired in the time between the trial and petitioner's new-trial motion and he "ha[d] no memory of the empanelment process." Pet. App. 48a n.3. Two court security officers assigned to the case likewise lacked "any specific memory of the empanelment or the case." *Id.* at 50a. And, if relief were granted, the passage of time—13 years in this case—impairs the prospect of retrial. "[T]he erosion of memory and dispersion of witnesses * * * prejudice the government and diminish the chances of a reliable criminal adjudication." *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991) (citation and internal quotation marks omitted). *Strickland* sanctions that outcome in only cases where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [original] proceeding would have been different." 466 U.S. at 694.

The Court has cautioned that "[c]ases involving Sixth Amendment deprivations," no less than cases

involving other constitutional rights, "are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Granting *Strickland* relief to a defendant who has not shown a reasonable probability that he would not have been convicted absent the error would infringe, entirely unnecessarily, on an interest that *Strickland* identified as one of "profound importance"—the interest in "finality in criminal proceedings." 466 U.S. at 693-694. As the Court has explained, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (citation omitted). *Strickland*-based attacks on a criminal judgment are therefore limited to attorney errors that affected the outcome of a criminal proceeding.

3. In petitioner's case, the Commonwealth presented to the jury, *inter alia*, eyewitness testimony; ballistics evidence showing that the gun that killed Rucker matched the description of a gun carried by a young man who lost his hat while running down the street after gunshots were fired; DNA evidence showing that the hat belonged to petitioner; and evidence that petitioner had confessed to the crime. No reasonable probability exists that the outcome of petitioner's trial would have been any different had petitioner's mother or other members of the public been admitted to the courtroom during jury selection. It is difficult to conceive of any way in which the courtroom

closure in this case could have affected the outcome of trial, and petitioner has never tried to make such a showing. This case exemplifies just how disruptive that departure from *Strickland* would be and illustrates why it should be rejected.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted.

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AND
RIEF.

No. 16-240

Supreme Court, U.S.
MAR - 6 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

—v.—

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MASSACHUSETTS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than one million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Massachusetts is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving whether prejudice should be presumed in addressing ineffective assistance of counsel claims in which counsel's ineffective representation results not in mere trial error but in structural error. Given its longstanding interest in the protections contained in the Constitution, including the Sixth and Fourteenth Amendment rights to due process, a fair trial, and constitutionally adequate defense, the questions before the Court are of substantial importance to the ACLU, its Massachusetts affiliate, and their members.

STATEMENT OF THE CASE

A Massachusetts jury convicted Kentel Weaver of possession of an unlicensed firearm and murder. For the entirety of jury selection, the trial court fully closed the courtroom to Weaver's family and the public. App. 6-8. Weaver's lawyer, however, failed to object to the closure. Weaver himself was unaware that the closure violated his constitutional rights. In Weaver's motion for a new trial, filed by new counsel,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No party has authored this brief in whole or in part, and no one has made a monetary contribution to the preparation or submission of this brief other than *amici*, its members, and its counsel.

he raised the error in his trial counsel's failure to object immediately to the courtroom closure. App. 88. At an evidentiary hearing, the trial court found that the closure did not meet the criteria for a permissible closure under *Waller v. Georgia*, 467 U.S. 39, 48 (1984), and that trial counsel's failure to object had not been a reasonable trial strategy but "was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable," Pet. App. 40a. The court nonetheless denied relief because it concluded that Weaver had failed to demonstrate how the closure had prejudiced him.

Weaver conceded that he had not shown prejudice, *id.* at 40a – a showing that was in fact impossible to make – but argued that where, as here, defense counsel ineffectively fails to object to a structural error in the trial proceedings, prejudice should be presumed under the second prong of *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). Pet. App. 39a-40a. The trial court rejected Weaver's argument, and the Massachusetts Supreme Judicial Court affirmed. *Id.* at 40-41.

SUMMARY OF ARGUMENT

Structural errors, by definition, rob defendants of a fair trial. A trial infected with one of the limited errors this Court has deemed "structural" cannot "reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 577–78 (1986). At the same time, the "precise effects"

of structural errors are "indeterminate" and "unmeasurable[,]" making it impossible to point to specific evidence of prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). A defendant denied a public trial cannot identify precisely how the closed trial prejudiced him, but that does not diminish the fundamental deprivation suffered. An appellant who establishes structural error therefore is entitled to relief without undergoing the "harmless error" analysis that would apply to mere trial errors. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

Whether structural error follows in the wake of defense counsel's unsuccessful objection to the trial court, or follows counsel's ineffective failure to object, the result is the same. The defendant has been convicted in a trial lacking fundamental fairness and the prejudice flowing from the error is impossible to prove. Thus, where counsel, through deficient performance, fail to object to structural errors, prejudice should be presumed for purposes of establishing ineffective assistance of counsel as well.

The court below found that petitioner's counsel failed to object to the unconstitutional closure of jury selection out of ignorance of the law, but held that petitioner had not proven prejudice and that prejudice would not be presumed. Under this approach, ineffective assistance with respect to the most serious errors, those that infect the entire trial and are deemed "structural," is for all practical purposes immune from review. As one circuit court held in denying a claim of ineffectiveness under *Strickland*, for lack of proof that counsel's failure to object to a courtroom closure caused prejudice, "[w]e do not know, and when we do not know the party

with the burden loses, and here that party is" the defendant. *Purvis v. Cosby*, 451 F.3d 734, 741 (11th Cir. 2006). Because prejudice cannot be demonstrated with respect to structural errors, requiring that defendants prove prejudice is a fatal obstacle to any relief. As a result, only those defendants with effective counsel who object are guaranteed the protection of this Court's structural-error jurisprudence.

If prejudice is presumed with respect to deficient failure to object to structural errors, the Court's familiar *Strickland* jurisprudence is more than adequate to ferret out insubstantial or contrived claims of structural error. The lower court's prior precedent raises the specter of unethical trial lawyers withholding objections to structural error at trial to preserve an appellate parachute. But under proper application of *Strickland*, such claims would fail. *Strickland*, 466 U.S. at 690. Reviewing courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Strategic failures to object do not meet this test.

Petitioner highlights the vital importance of the public-trial right, Pet. Br. 15-20, and the injustice of requiring a defendant to prove quantifiable prejudice given this Court's decisions holding that structural errors defy harmless-error analysis. *Id.* at 26-29. The same analysis applies to other structural errors, as amici illustrate through examples of other types of structural error where prejudice could not be proved, and where the errors, if uncorrected, would have undermined fundamental justice. This Court has overturned convictions in such cases without

undertaking harmless error analysis precisely because prejudice is unmeasurable and impossible to prove.

These examples illustrate the importance of the structural error doctrine to ensuring justice, and also demonstrate the arbitrariness that would result if the approach to ineffective assistance claims below is upheld. The harm would fall only on those unlucky few who not only endure trials infected with structural error, but are represented by counsel who, through ignorance or incompetence, fail to recognize and object to such error. Moreover, the victims of those double constitutional errors would be almost exclusively the indigent.

ARGUMENT

I. PRESUMING THAT PREJUDICE FLOWS FROM COUNSEL'S DEFICIENT FAILURE TO OBJECT TO STRUCTURAL ERROR IS NECESSARY TO UPHOLD CRITICAL CONSTITUTIONAL RIGHTS.

The rule proposed here – that prejudice should be presumed, where counsel, through constitutionally deficient performance, fails to object to a "structural error" – is necessary to vindicate essential rights bearing on the fundamental fairness of the trial itself.

A. Presuming Prejudice Would Uphold Vital Structural Rights.

By definition, structural errors "render a trial fundamentally unfair." *Rose*, 478 U.S. at 577–78. The accused forced to trial before a biased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927), or without counsel,

Gideon v. Wainright, 372 U.S. 335 (1963), or without a jury, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), is denied the trial our Constitution guarantees. *See* U.S. Const. amends. VI, XIV. A trial without these safeguards "cannot reliably serve its function as a vehicle for determination of guilt or innocence . . .1and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-78.

Other basic protections of our Constitution similarly define the "framework within which the trial proceeds[.]"*Fulminante*, 499 U.S. at 310; *United States v. Marcus*, 560 U.S. 258, 263 (2010) (quoting *Fulminante* and noting the class of structural errors is "limited"); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (same). These include the right to a grand jury selected without racial discrimination, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177–178 (1984); and the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). *Fulminante*, 499 U.S. at 310 (internal parallel citations omitted).

When these protections are disregarded, the accused is denied a criminal trial that is reliable, fundamentally fair, *id.*, and consistent with "the American scheme of justice," *Duncan*, 391 U.S. at 149. To obtain relief on appeal, the defendant therefore need only show that structural error has occurred, and the "harmless error" analysis that governs mere trial errors is inapplicable. *Id.*

Harmless error analysis is not necessary because structural errors, by their very nature, defy case-specific proof of prejudice typical of mere trial

error. A court reviewing whether trial error caused prejudice evaluates the evidence remaining after evidence improperly admitted is set aside. *Fulminante*, 499 U.S. at 310. That's not possible with structural error. As the Court has explained:

> [Structural errors] defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.

Id. at 309-10. *See also Sullivan*, 508 U.S. at 281 (noting the "precise effects" of structural errors are "indeterminate" and "unmeasurable").

What is true on review of a structural error on direct review is also true on review of a claim that counsel, through ignorance or incompetence, provided ineffective assistance by failing to object to a structural error. In both circumstances, the error simultaneously infects the whole trial and defies a specific demonstration of prejudice.

The position of the court below would therefore render appellate error correction unavailable for those with the misfortune of representation by counsel who unprofessionally, incompetently, and without reasonable strategic motive, failed to object to "structural errors." *See Strickland*, 466 U.S. at 687-89 (setting forth first prong of ineffectiveness standard). Unable to show prejudice flowing from an error that by definition defies such a showing, *Fulminante*, 499 U.S. at 309-10, the claim of

ineffective assistance would fail under *Strickland*'s second prong.

Denying appellate relief for those unlucky enough both to have been convicted in a trial tainted by structural error and by counsel who, through constitutionally deficient performance, failed to object, would make a mockery of our tradition of requiring fair trials.

Two additional considerations support this conclusion. First, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (holding that where a "procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State"); *Cuyler v. Sullivan*, 446 U.S. 330, 344 (1980) ("The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."); *see also Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("The constitutional mandate is addressed to the action of the State.").

The State that permits a structural error in a criminal trial should not obtain a windfall by also failing to ensure that the accused has adequate representation. *Cf. Chapman v. California*, 386 U.S. 18, 24 (1967) ("requiring the [State as] beneficiary of a constitutional error to prove beyond a reasonable doubt that [constitutional trial] error complained of did not contribute to the verdict"). When the accused is denied adequate representation and the result is

the failure to object to structural error, her conviction is fundamentally unfair and unreliable.

Second, presuming prejudice from counsel's ineffective failure to object to structural error is essential to safeguard structural rights. Even when appellate counsel raise unpreserved error on direct appeal, defendants are far from guaranteed relief under the wide range of state practices with respect to procedural default. Most but not all state appellate courts permit some variety of "plain error" review of unpreserved error. *See generally* Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial & App. Advoc. 179, 222 (2012) (collecting state "plain error" review standards). The burden an appellant must carry to win relief under these standards, however, varies widely. *Id.* at 222-242 (describing the various standards).

Some state courts withhold relief on appeal when trial counsel have failed to object to structural errors. *See, e.g., Stackhouse v. People*, 386 P.3d 440, 446 (Colo. 2015) (finding defendant "affirmatively waive[d] . . . right to public trial by not objecting to known closures"); *Barrows v. United States*, 15 A.3d 673, 681 (D.C. 2011) (concluding that although wrongful courtroom closure is structural error, defendant failed to prove sufficient prejudice for relief); *People v. Vaughn*, 821 N.W.2d 288, 305 (Mich. 2012) (same); *State v. Butterfield*, 784 P.2d 153, 156 (Utah 1989) (concluding that right to open courtroom may be waived by failure to object to closure). *Compare with Lane v. State,* 80 So. 3d 280, 302-03 (Ala. Crim. App. 2010) (reversing based on structural error to which counsel had not objected as plain

error); *Savoy v. State,* 22 A.3d 845, 859 (Md. 2011) (similar).

Thus, absent a ruling requiring prejudice to be presumed when counsel, through constitutionally deficient performance, fails to object to structural errors, a defendant's entitlement to appellate relief for structural constitutional errors will not be guaranteed. It will depend entirely on geography. "That result is contrary to the Supremacy Clause and the Framers' decision to vest in 'one supreme Court' the responsibility and authority to ensure the uniformity of federal law." *Danforth v. Minnesota,* 552 U.S. 264, 292 (2008) (Roberts, C.J., dissenting).

Presuming prejudice flows from counsel's ineffective failure to object to such errors is therefore essential to ensure the uniform application of vital constitutional protections.

B. Presuming Prejudice Would Uphold The Right To Effective Counsel.

Presuming prejudice in these circumstances would also vindicate the right to effective assistance of counsel itself. To do so does not risk affording relief to unworthy or "sandbagged" appellate claims; nor does it encourage counsel to "'harbor error as an appellate parachute'" by declining to object at trial to structural error. *Commonwealth v. LaChance*, 17 N.E.3d 1101, 1112 (Mass. 2014) (a decision relied on by the lower court) (quoting *People v. Vaughn*, 821 N.W.2d 288, 308 (Mich. 2012)), *cert. denied*, 136 S. Ct. 317 (2015).

The Court has instructed reviewing courts to presume counsel has "rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment[.]" *Strickland*, 466 U.S. at 690. Reviewing courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant seeking relief must, under prong one of *Strickland*, "show that counsel's performance was deficient." *Id.* at 687. When the defendant fails to do so, he will not be entitled to relief. *See, e.g.*, *Burt v. Titlow*, __ U.S. __, 134 S. Ct. 10, 17 (2013).

In jurisdictions where courts already presume counsel's ineffective failure to object to structural error is prejudicial,[2] insubstantial claims of ineffectiveness have been rejected as not constituting deficient performance. *See Johnson v. Sherry*, 465 Fed. Appx. 477, 481 (6th Cir. 2012) (unpublished decision) ("Johnson's lawyer apparently weighed the minimal benefits against the significant costs of objecting to the closure, and then decided against it. The Constitution permitted him that choice."); *Addai v. Schmalenberger*, 776 F.3d 528, 536 (8th Cir. 2015) (noting "that almost all of the testimony during the time the courtroom was closed was elicited by . . . trial counsel, which was part of trial counsel's strategy for which he so aggressively fought to permit the witness to even testify at all"); *State v. Racz*, 168 P.3d 685, 690 (Mont. 2007) (dismissing claim that counsel ineffectively failed to maintain cause challenge of allegedly biased jurors because the appellate record did not foreclose the possibility of an unspoken strategic reason). *Cf. Eberhardt v. Wenerowitz*, No. 13-1700, 2016 WL 5390567, at *1

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[2] *See* Pet. for Cert. at 11-15 (collecting cases from Montana, the Sixth Circuit, and the Eighth Circuit).

n.3 (E.D. Pa. Sept. 26 2016) (denying a certificate of appealability for the open question whether defendants must show prejudice for structural errors raised under ineffectiveness claims because the defendant's ineffectiveness claim was properly denied on the deficiency prong).

Absent countervailing strategic considerations, defense lawyers are professionally obligated to object to structural constitutional errors. *See* American Bar Association ("ABA"), *Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-3.6 (3d ed. 1993) ("Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights."); *see also* ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.8 (A) (rev. ed. 2003) (requiring counsel to consider all legal claims potentially available, investigate whether they should be asserted, with attention to the importance of preserving legal error should an appeal later become needed).[3]

Ordinarily, counsel's objection will prompt the trial court to "consider and resolve" the issue

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[3] Further, "[t]he basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." *Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-1.2 (3d ed. 1993). The gamesmanship assumed in the notion that counsel would knowingly preserve an appellate parachute is also inconsistent with professional norms.

appropriately. *Puckett v. United States*, 556 U.S. 129, 134 (2009). Whether convicted or acquitted, the defendants in those trials will have had their structural rights honored. In a smaller set of cases, the trial court will overrule a valid objection to structural error, the defendant will be convicted, and an appellate court will reverse the conviction. *See, e.g.*, *Vasquez*, 474 U.S. at 264 (affirming grant of habeas relief due to racial discrimination in selection of grand jurors).

The only structural errors left unremedied are those where defendants are convicted in trials infected both by structural error and by counsel's constitutionally deficient failure to object. There is no reason to deny relief from such doubly tainted trials.

II. OTHER "STRUCTURAL ERROR" CASES ILLUSTRATE THE NEED TO PRESUME PREJUDICE WHERE ERROR DEFIES A SPECIFIC DEMONSTRATION OF PREJUDICE.

Petitioner has demonstrated the critical importance of the public-trial right, Pet. Br. 15-20, and the unfairness of requiring prejudice to be shown where it is impossible to prove. *Id.* at 26-29. The case examples below highlight other critical applications of structural error and show why a prejudice requirement would be an insurmountable hurdle for those claims as well.

A. Denial Of An Impartial Judge.

Victor Berger was a journalist and former Congressman who had represented a district in Milwaukee, Wisconsin after World War I. Sally M. Miller, *Victor Berger and the Promise of Constructive*

Socialism, 33, 39 (1973). He was also a Social Democratic Party activist, *id.* at 26, and an immigrant born in what was then Austria-Hungary. *Id.* at 17. While running as the Social Democratic candidate in a special election to fill one of Wisconsin's U.S. Senate seats, Berger was indicted under the Espionage Act of 1917, based on his newspaper editorials calling for the preservation of civil liberties and criticizing the military draft. Joseph A. Ranney, *Aliens and "Real Americans": Law and Ethnic Assimilation in Wisconsin 1846-1920*, 67 Wis. Law. 28, 58 (Dec. 1994).

District Court Judge Kenesaw Landis was assigned Berger's case. *See Berger v. United States*, 255 U.S. 22, 28 (1921). Berger moved to recuse the judge, citing his public comments evincing his deep animus against German Americans. *Id.* at 28-29. To the recusal motion, counsel attached an affidavit documenting several prejudicial statements made in public by Judge Landis, including:

- "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it . . . ."
- "[The German-Americans'] hearts are reeking with disloyalty."

Id. at 28-29. The motion to recuse Judge Landis "was denied and upon the trial defendants were convicted and each sentenced to 20 years' imprisonment." *Id.* at 27.

On review, this Court found Judge Landis to be impermissibly biased, *id.* at 36, and remanded to the lower court. *Id.* That court in turn reversed the convictions of Berger and his codefendants. *Berger v.*

United States, 275 F. 1021, 1021 (7th Cir. 1921). Neither court paused to determine whether Judge Landis's participation in the trial court had caused prejudice, or was "harmless error." *Id.* As the Court has explained, such evaluation is impractical if not impossible: "When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez*, 474 U.S. at 263. The government took no further action. Ranney, *supra*, at 58.

The people of Berger's Wisconsin district then elected him to three successive terms (1922, 1924, 1926) in the U.S. Congress. Library of Congress, *Victor Berger: America's First Socialist Congressman*, https://www.loc.gov/rr/news/topics/berger.html (last visited March 3, 2017).

B. The Denial Of A Jury Trial Right.

Denying someone the right to a jury trial has also been treated as structural error. Gary Duncan was an African American 19-year-old when he encountered several white boys in Louisiana, and either "slapped" one on the elbow or "merely touched" him. *Duncan*, 391 U.S. at 148. He was tried before a judge, not a jury, who found Duncan guilty of simple battery, and sentenced him to a fine and 60 days' imprisonment. *Id.* at 147. Duncan had requested a trial by a jury of his peers. *Id.* at 146-47. But because the Louisiana Constitution guaranteed a jury trial only for capital punishment or imprisonment at hard labor, the trial judge denied his request. On review, this Court held that the Sixth Amendment entitled

Duncan to a jury trial for the "serious crime" with which he was charged. *Id.* at 156, 161.

The Court reversed the judgment below, with no evaluation of prejudice or "harmless error." *Id.* at 161. As the Court later explained of *Duncan*, an analysis of prejudice is impossible: "[T]he State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578.

Following the Court's ruling, the State of Louisiana appeared determined to retry Duncan, again without a jury. Alvin J. Bronstein, *Representing the Powerless: Lawyers Can Make a Difference*, 49 Me. L. Rev. 1, 12 (1997). The legislature amended the battery statute "to max the punishment at six months rather than two years, and then they wanted to prosecute Duncan again without a jury trial. They arrested him again," and his lawyers went to "federal court to enjoin this prosecution." *Id.* Duncan's lawyers argued that any touching that occurred was an everyday occurrence, not a crime, and that the prosecution was in bad faith. *Id.* The federal judge held that the Louisiana officials were acting in bad faith, a decision upheld by the court of appeals. *Id.* at 12, 13 n. 18 (citing *Duncan v. Perez*, 445 F.2d 557 (5th Cir. 1971) (applying *Younger v. Harris*, 401 U.S. 37 (1971)).

Thus, because showing how a trial by a hypothetical jury would have differed from a trial by a judge is impossible, the presumption of prejudice is necessary to provide relief for those "rare" instances in which the defendant is denied a jury trial without objection by trial counsel. *McGurk* v. *Stenberg*, 163

F.3d 470, 475 n.5 (8th Cir. 1998) (reversing where defense counsel deficiently failed to object or advise his client of the jury trial right, and noting that such instances of presumed prejudice for structural errors will rarely arise).

C. Denial Of Right To Counsel.

Charles Clarence Hamilton was convicted of breaking and entering a dwelling at night and sentenced to death. *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961). Hamilton had counsel at trial, but not at arraignment, where "[a]vailable defense[s] may be . . . irretrievably lost, if not then and there asserted, as they are when accused represented by counsel waives a right for strategic purposes." *Id.* at 54. Hamilton's trial counsel, however, failed to object that his client had not been represented at arraignment.[4] The Alabama Supreme Court ultimately denied relief on the grounds that counsel's absence did not prejudice Hamilton. *Ex parte Hamilton*, 122 So. 2d 602, 604 (Ala. 1960). This Court, however, presumed prejudice and rejected Alabama's argument that the error was harmless, explaining that "the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." *Hamilton*, 368 U.S. at 55.

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[4] This is apparent because the original trial record incorrectly stated that Hamilton did in fact have counsel at the arraignment, *Hamilton v. State*, 116 So. 2d 906, 909 (Ala. 1960), a finding that Hamilton's appellate counsel had to challenge via a separate writ before the Alabama Supreme Court would reach the merits of his claim. *Ex parte Hamilton*, 122 So. 2d 602, 604 (Ala. 1960).

D. Race Discrimination In Jury Selection.

Race discrimination in petit and grand juries are another type of structural error where a prejudice requirement would prove an insurmountable obstacle to ineffective assistance claims. *See, e.g., Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011) (presuming prejudice and granting relief where defense counsel intentionally removed all men from the jury); *Drain v. Woods*, 902 F. Supp. 2d 1006 (E.D. Mich. 2012) (granting relief where counsel "failed to object to the obvious pattern of strikes against minority jurors" without requiring a prejudice showing). Such claims have on occasion succeeded, albeit rarely. In the jurisdictions that required prejudice, the defendant's claim necessarily failed. *See, e.g., Jackson v. Herring*, 42 F.3d 1350, 1362 (11th Cir. 1995) (finding counsel deficient for failing to object to prosecution's removal of all Black jurors, stating that it "would have more confidence in the verdict had it been delivered by a constitutionally composed jury," but denying claim because the defendant could not show a reasonable likelihood of a different verdict); *Young v. Bowerox*, 161 F.3d 1159, 1160 (8th Cir. 1998) (rejecting *Batson* claim where attorney failed to object because the defendant could not show "how the outcome of the trial would have been different in the absence of a structural defect").

Consider Grady Bankhead, a white man, sentenced to death in an Alabama state trial where the prosecutor "peremptorily challenged 8 of the 10 blacks on the jury panel." *Ex parte Bankhead*, 585 So. 2d 112, 117 (Ala. 1991). Although Bankhead did not object, the Alabama courts reviewed his *Batson*

claim on appeal as plain error, and remanded for a hearing where the State could offer race-neutral reasons for its strikes. *Ex parte Bankhead*, 585 So. 2d at 117.

On remand, the prosecutor explained that one African American prospective juror did not fit the "best juror profile" because he was an "older black male[,]" that two black women did not fit the "best juror profile" because they were women, and that one black man caused the prosecutor a bad gut reaction, while another purportedly "rubbed his face in disgust" at the mention of sequestration. *Ex parte Bankhead*, 625 So.2d 1146, 1147 (Ala. 1993). The court also noted that the prosecutor had "been found to have systematically excluded black veniremembers in violation of *Swain v. Alabama*, 380 U.S. 202 (1965) . . . and the State had failed to conduct any meaningful voir dire of the excluded black veniremembers." *Ex parte Bankhead*, 625 So. 2d at 1147 (parallel internal citations omitted).

The Alabama Supreme Court found that Bankhead had established a prima facie showing of racial discrimination, that the prosecutor had failed to offer a race-neutral reason with respect to the older black male prospective juror, and that the race-neutral reasons the prosecutor had offered were suspect. *Ex parte Bankhead*, 625 So. 2d at 1148. The court thus reversed Bankhead's conviction and death sentence. *See also Drain v. Woods*, 902 F. Supp. 2d 1006 (E.D. Mich. 2012) (following similar approach to

counsel's ineffective failure to object to *Batson* violation, and presuming prejudice).[5]

The court did not pause to evaluate whether Bankhead had shown prejudice in the outcome of his trial, or whether the error was harmless, presumably because it "simply cannot [be] know[n]" whether a "properly constituted" jury would have convicted. *Vasquez*, 474 U.S. at 264 (similar findings with respect to effect of discrimination in grand jury selection). *See also, Winston v. Boatwright*, 649 F.3d 618, 632 (7th Cir. 2011) ("Prejudice, in other words, is automatically present when the selection of a petit jury has been infected with a violation of *Batson* or *J.E.B.*"). *Compare with Batiste v. State*, 888 S.W.2d 9, 15 (Tex. Crim. App.1994) (rejecting claim of ineffective assistance of counsel where counsel, through deficient performance, failed to lodge *Batson* objection, for failure to establish prejudice).

In each of these cases, structural errors deprived defendants of fundamentally fair trials. In each instance, the nature of the error defied "harmless error" or "prejudice" analysis, because the precise effect of the errors could not be demonstrated. Such errors should be remedied whether a defendant's lawyer objected unsuccessfully or failed, through deficient performance, to object. Under the lower court's approach here, only *some* defendants in jurisdictions with more forgiving plain-error standards will be eligible for relief. *See, e.g., Diggs v.*

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[5] In 1994, Bankhead was resentenced to life imprisonment without release. *See* http://www.doc.state.al.us/InmateHistory.aspx (search last name Bankhead).

State, 973 A.2d 796, 815–16 (Md. 2009) (excusing counsel's failure to object to judge's "repeated and egregious behavior of partiality," presuming prejudice, and granting relief). Others whose trials were similarly marred by structural constitutional error will get no relief. *Batiste*, 888 S.W.2d at 15. *See also* p.10, *supra* (collecting cases of unpreserved structural error with different outcomes in different jurisdictions). The only way to ensure relief for all defendants doubly harmed by structural error and constitutionally deficient assistance of counsel is to presume prejudice.

III. THE COST OF NOT PRESUMING PREJUDICE WILL FALL MOST HEAVILY ON THE POOR.

Structural errors are rare. *See* Brief for Petitioner at 34. Instances when counsel fail to object to structural error, for a demonstrably non-strategic purpose, will be rarer still. *Id.*; *see also*, Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense reform*, 97 Minn. L. Rev. 1197, 1214-1215 (2013) ("[T]he vast majority of ineffective assistance of counsel claims are unsuccessful."); John Blume and Stacey Neumann, *"It's Like Déjà vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and A (Partial) Return to the Guidelines Approach To The Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 142 (2007) ("Almost all representation was found to be within *Strickland*'s 'wide range of professionally competent assistance.'"). But where this double-problem arises, its burdens will virtually always fall on indigent or low income defendants.

Abysmal representation for poor people undermines every aspect of the criminal justice system, but has long been a particularly egregious problem in death-penalty cases, where the stakes are the highest. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679, 683 (1990). As Justice Ginsburg acknowledged some years ago, "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented by counsel." Associated Press, *Oklahoma Governor Commutes Death Case, Texas Bill Boosts Defense for Poor*, Chicago Tribune, Apr. 11, 2001, at 8.

A prime example is *Knese v. State*, 85 S.W.3d 628 (Mo. 2002). In this capital case, defense counsel failed to read the jury questionnaires of two seated jurors whose statements strongly suggested they would automatically impose the death penalty. Due to that failure, counsel did not voir dire the jurors about their statements or move for cause. The Missouri Supreme Court found ineffective assistance and reversed the death sentence.[6] In fact, the defense

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[6] In this context, the court reversed after finding that the jurors' predisposition to impose death established a "reasonable probability" to undermine confidence in the verdict. *Knese*, 85 S.W.3d at 633. This is the exceptional variety of structural error that might be open to a showing of prejudice. But it is the exception that proves the rule; as this Court has acknowledged, structural errors generally defy analysis of prejudice. *See Vasquez*, 474 U.S. at 263; *cf. White*, 290 S.W. 3d at 165.

attorney had not handled a death penalty case in over 15 years, and had been disbarred for nine and a half years before representing Knese. *Id.* at 631-32.[7]

Similar problems infect non-capital trials of the indigent. Sonny White, an indigent Missouri defendant, was represented by appointed counsel. His lawyer failed to object to a juror who responded on three occasions during voir dire that he could not be fair to the defendant. *White v. State,* 290 S.W.3d 162, 166 (Mo. Ct. App. 2009). The appellate court concluded that no reasonably competent attorney would have permitted the juror to serve, and reversed. *Id.* at 167. His defense attorney surrendered his law license the year after White won a new trial, and the lawyer was later sentenced to five years' probation for criminal violations, including fraud and public urination. *In re: Alan S. Cohen,* MBE 39896, No. SC90622 (Mo. 2010); Doyle Murphy, *Disbarred St. Louis Lawyer Charged with Fraud, Public Urination,* Riverfront Times (Nov. 6, 2015).

Failing to provide a meaningful remedy for structural errors where deficient counsel do not object will impose an insurmountable obstacle to relief on those who least deserve it: poor people who

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[7] The attorney was reprimanded in 1976 for failing to return client funds. *In re Wendt,* 544 S.W.2d 3 (Mo. banc 1976). He surrendered his law license in 1981 following additional misconduct, and reacquired it in 1989. Informant's Brief, *In re: Robert H. Wendt,* No. SC86642 2005 WL 2213903, *4-*6 (Mo. June 10, 2005). During his disbarment, he was convicted and sentenced to prison for a federal conspiracy charge. *Id.* at *6. After reinstatement, he was admonished in 1994, three years before Knese's trial, for breaking the rule against contact with represented parties. He was admonished yet again in 1999 for a breach of diligence.

are unlucky enough to be represented by inadequate, over-burdened, or incompetent counsel.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be reversed.

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

KENTEL MYRONE WEAVER,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The Massachusetts Supreme Judicial Court

BRIEF OF THE STATE OF ARKANSAS, STATE OF ALABAMA, STATE OFARIZONA, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF HAWAII, STATE OF IDAHO, STATE OF INDIANA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF MAINE, STATE OF MARYLAND, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF OKLAHOMA, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TENNESSEE, STATE OF TEXAS, STATE OF UTAH, STATE OF WASHINGTON, STATE OF WEST VIRGINIA, STATE OF WISCONSIN, AND STATE OF WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* STATES

The 38 *Amici* States have important interests that could be affected by the Court's decision. We have a keen interest – from both a law enforcement and public fisc perspective – in the finality of criminal proceedings. We also have a keen interest – on behalf of our governments and on behalf of our citizens – in the proper application of the Sixth Amendment's right to Assistance of Counsel. The preservation of the *Strickland* standard and the rejection of the incredibly broad presumption of prejudice being proposed by Petitioner are critical to maintaining the proper balance between the interests of finality and the interests of reliably accurate trials reflected in the Sixth Amendment's guarantee of counsel. Finally, as detailed by the certiorari-stage *amicus* brief supporting Petitioner, the Court's decision in this ineffective assistance of counsel case will likely guide how lower courts address various types of collateral attacks of state convictions in federal court. Federalism concerns make it important for us to ensure that the law in this area continues to strictly circumscribe the circumstances in which a federal court may second-guess a state conviction.

INTRODUCTION AND SUMMARY OF ARGUMENT

Even the most ardent supporters of the most robust conception of the Sixth Amendment right to counsel concede that the right has expanded far beyond its

original confines. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 Harv. C.R.-C.L. L. Rev. 1, 8 (2013) ("It is generally understood . . . that the drafters did not intend to afford those charged with crimes an affirmative right to counsel, but rather the right to retain counsel at their own expense."); *Accord Scott v. Illinois*, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.") (citation omitted). The modern expansion of the right to counsel required this Court to strike a delicate balance between this right and other critical aspects of our justice system – namely finality. The Court struck this essential balance in *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984).

Petitioner seeks to undo the balance crafted by this Court in *Strickland* and *Cronic*. In doing so, Petitioner is attempting to wield the outer reaches of the right to counsel as a bludgeon against the long-standing and important interests of the states, the federal government, and the justice system itself in finality. Importing a wide-ranging presumption of prejudice into the *Strickland* test would seriously undermine the contemporaneous objection requirement, invite second and third bites at the apple in cases of waived structural error, and encroach on the independence and dignity of state courts. This Court should decline to take

such a leap. *Cf. Scott*, 440 U.S. at 372 ("As a matter of constitutional adjudication, we are, therefore, less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so.").

In Part I of this brief, *Amici* States analyze the intentional middle-path chosen in *Strickland* and *Cronic* to resolve the tension between constitutional fairness and finality. Vital to this endeavor was the Court's adoption of its two-pronged test to determine whether a particular error of counsel amounted to a Sixth Amendment violation. The Court particularly emphasized the importance of the prejudice prong to this determination. And it rejected the notion of allowing a legal presumption of prejudice except in an extremely narrow, limited, and defined set of circumstances – none of which are at issue in this case.

In Part II of this brief, *Amici* States argue for the preservation of the balance struck in *Strickland* and *Cronic*. Petitioner's position – that the Court should automatically presume prejudice whenever counsel's deficiency results in an error that this Court has previously classified as structural – conflates and undermines the essential distinctions between direct review and collateral attack. A greatly-expanded number of categories where prejudice is automatically presumed for purposes of *Strickland* would subvert the contemporaneous objection rule, incentivize gamesmanship by defense counsel, and significantly undermine the

finality of criminal convictions. The context of a collateral attack strongly counsels that each specific alleged error (and not the far more abstract "category of error") should be judged on its own terms and in the context of the specific proceedings at issue.

In this case, prejudice should not be presumed from the closure of the jury selection process, especially where a public transcript of the proceedings exist. And Petitioner admits that he provided no evidence of prejudice whatsoever. *Amici* States therefore request that this Court find in favor of Respondent, the Commonwealth of Massachusetts.

ARGUMENT

I. *Strickland v. Washington* and *United States v. Cronic* represent an important balance between finality and constitutional fairness.

In *Strickland* and *Cronic*, this Court labored to reasonably cabin the enlarged right to counsel in a way that balanced the animating purpose of the right with the need to prevent the right from swallowing the rules of waiver and finality. After setting forth the now-familiar two-prong test and placing significant parameters on the deficiency prong, the Court explained that a constitutional violation of the Sixth Amendment does not occur unless "any deficiencies in counsel's performance [are] prejudicial to the defense." *See Strickland*, 466 U.S. at 692. The Court concluded that the prejudice requirement comported with "the purpose of the Sixth

Amendment guarantee of counsel," which the Court explained is to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92. The Court also concluded that the prejudice requirement was necessary to identify which failures of counsel "are sufficiently serious to warrant setting aside the outcome of [a] proceeding." *Id.* at 693.

With respect to the prejudice prong, the Court set forth two important points of law that have survived the last 30-plus years. *First*, the Court formulated a middle-ground test for prejudice. *See id.* at 693-94. The Court rejected the "impaired the presentation of [a] defense" standard as too low because "not every error that conceivably could have influenced the outcome undermines the reliability of the result of [a] proceeding." *Id.* at 693. At the same time, the Court rejected as too high a requirement that the defendant show "counsel's deficient conduct more likely than not altered the outcome [of] the case." *See id.* at 693-94. The Court explained that such a standard is inappropriate where the defendant is asserting "the absence of one of the crucial assurances that the result of the proceeding is reliable." *Id.* at 694. The Court settled on a middle-ground prejudice test that requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (defining "reasonable probability" as "a probability sufficient to undermine confidence in the outcome" of the case).

Second, the Court rejected a presumption of prejudice in nearly all cases of ineffectiveness predicated on an attorney's voluntary action or omission at trial. The Court carefully and forcefully restricted the cases in which prejudice could be presumed to two areas: (1) where the state affirmatively interfered with counsel's assistance,[1] and (2) where counsel was either actually or constructively absent from the trial "altogether." *See id.* at 692; *see Cronic*, 466 U.S. at 658-59.[2] The Court went to great lengths in both decisions to juxtapose these wholesale denials of counsel with claims of ineffectiveness predicated on an attorney's own specific acts or omissions at trial. *See id.* at 659 n.26 ("Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific

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[1] Presuming prejudice is unsurprising in this context. Preventing the state from actively interfering with a defendant's right to retain or use counsel is far closer to what everyone understands as the original meaning of the Sixth Amendment right to counsel. *See supra* at pp. 1-2. In such circumstances, as we approach the core constitutional right, there is less need or justification for a prejudice test. *Cf. United States v. Gonzalez-Lopez*, 548 U.S. 140 at 146-48 (2006).

[2] The "more limited" presumption of prejudice referenced in *Strickland* regarding actual attorney conflicts of interest is best read as a subgroup of the second grouping. *See Strickland*, 466 U.S. at 692-93. *See also Cronic*, 466 U.S. at 659-60 ("Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.").

errors of counsel undermined the reliability of the finding of guilt."). *See also id.* at 666 n.41 (emphasizing that specific errors of counsel at trial should be analyzed under the *Strickland* standard). *See Strickland*, 466 U.S. at 693 (noting the importance of the prejudice requirement where "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence"). The Court emphasized that such errors "cannot be classified according to likelihood of causing prejudice." *Id.* Rather, each case must be evaluated on its own terms and in its own context to decide if a particular error "actually had an adverse effect on the defense." *Id.*

The Court's decision to carefully and narrowly limit the availability of presumption of prejudice was not taken lightly. Indeed, a principal argument in Justice Marshall's vigorous dissent in *Strickland* was the propriety and importance of a presumption of prejudice. *See id.* at 711 (Marshall, J., dissenting). Relying on *Chapman v. California*'s discussion of certain constitutional rights that are "so basic to a fair trial that their infraction can never be treated as harmless error," Justice Marshall argued that any "showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice." *Id.* at 711-12. Justice Marshall essentially argued that the prejudice prong was inappropriate (or should in every case be presumed) because the right to counsel is critical to ensuring a

fundamentally fair framework in which to have a trial. *See id.* The Court, of course, rejected this view in favor of its more balanced approach.

II. The balance struck in *Strickland* and *Cronic* should be preserved.

Petitioner's position today echoes Justice Marshall's position in dissent in *Strickland*. While not seeking to eradicate the prejudice prong from all ineffective assistance claims, Petitioner seeks to eradicate it in a significant number of cases. Doing so would upset the important balance between finality and reliability struck by the Court in *Strickland* and *Cronic*. Moreover, in light of *Strickland*'s liberal threshold for showing prejudice, there is little advantage and significant risk in the absolute presumption rule advanced by Petitioner.

Petitioner's basic argument is that the Court should automatically presume prejudice whenever counsel's deficiency results in a constitutional error that the Court has previously classified as "structural error" in direct review cases. Pet. Br. 22. But the purpose, scope, and interests to be vindicated on direct review are very different from the purpose, scope, and interests to be vindicated in a collateral attack. There is thus no good reason to entangle the two different areas of jurisprudence.

In the direct review situation, all of the equities weigh on the side of reversal for preserved constitutional error, including constitutional errors whose

impacts are of an indeterminate nature and those that protect values other than the accuracy and reliability of the trial. Accordingly, a demanding burden of proof on the State to prove harmlessness beyond a reasonable doubt coupled with broad categories of constitutional errors that are completely excluded from harmless-error review comports with the goals of the direct review system. *See Chapman v. California*, 386 U.S. 18, 23-24 (1967) (burden); *see also Gonzalez-Lopez*, 548 U.S. at 148-50 (listing the broad categories excluded from harmless-error review).

But a collateral attack – including a claim of ineffective assistance of counsel – is far different. *Cf. Brecht v. Abrahamson*, 507 U.S. 619, 633-37 (1993) (emphasizing the different interests to be taken into account on collateral review).[3] The underlying constitutional error is waived and no longer directly at issue. A court is instead addressing an entirely different question about whether counsel's conduct or omission together with the result of that conduct or omission was so severely problematic as to amount to a practical lack of assistance of counsel and thus a violation of the

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[3] *Amici* acknowledge that in this specific case, because of the unique nature of the Commonwealth of Massachusetts' procedural rules, the ineffective assistance of counsel claim is, as a purely technical matter, part of Petitioner's direct appeal. Resp. Br. in Opp. at 5-6. This is a distinction without a difference. First, whether part of the direct appeal or not, a claim of ineffective assistance of counsel like the one at issue here (concerning a specific error by counsel) is by definition a collateral, as opposed to a frontal or direct, attack on the conviction. Second, in many states, ineffective assistance of counsel claims like the one here can only be brought in a completely collateral proceeding.

Sixth Amendment. *See Gonzalez-Lopez*, 548 U.S. at 146-47 (explaining the significant distinction in the question). And this is precisely what the two-pronged *Strickland* test is intended to analyze. On this question, the equities flip from the direct review context; the presumption of constitutionality and the importance of finality of judgments have significant weight. In this situation, the goals of the system are undermined, not furthered, by broadly conceived categories of errors where prejudice is simply presumed as part of determining whether there is a constitutional violation in the first place. Attaching a presumption of prejudice to numerous broad categories of error will allow a petitioner to obtain a new trial in numerous instances where there is no factual prejudice, thus no unreliable outcome, thus no actual constitutional violation. This undermines finality without any concomitant benefit to reliability and accuracy.

It also undermines the contemporaneous objection rule, by making failure to object virtually risk-free for any structural error. The contemporaneous objection rule serves undeniably critical functions in our judicial system.[4] But defense counsel will have strong incentive *not* to object contemporaneously if that failure to

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[4] The contemporaneous objection rule "enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in [collateral proceedings]. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question." *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977). And the rule "may lead to the exclusion of the evidence objected to, thereby making a major

object is deemed *per se* prejudicial. This Court has long recognized that courts' willingness to hear unasserted claims "may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims" in a collateral proceeding "if their initial gamble does not pay off." *Sykes*, 433 U.S. at 89. That concern is magnified if the failure to raise the claim is *per se* prejudicial – particularly where the constitutional violation did not remotely increase the likelihood of conviction. Why wouldn't counsel allow the courtroom to be closed for, say, one hour during *voir dire* if that failure to object essentially guarantees his client a "get out of jail free" card?[5]

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contribution to finality of criminal litigation." *Id.* On top of that, "a timely objection will sometimes yield benefits by spurring the prosecutor to supplement the record, or prompting the trial court to seek additional information, make predicate factual findings, or state on the record the basis for decisions that might otherwise go unexplained." Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 Yale L.J. 922, 958 (2006).

[5] In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), this Court discounted concerns about counsel sandbagging potential Fourth Amendment claims because "when an attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review under the harmless-error standard of *Chapman v. California*. . . . By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted." *Id.* at 382 n.7. That reasoning does not apply to structural errors if Petitioner's theory is adopted. By defaulting a plain error, counsel guarantees that, should his client be convicted, the conviction will be overturned. This Court should not adopt a rule that encourages gamesmanship and discourages compliance with the contemporaneous objection rule.

Petitioner argues the broad categories of "structural error" must be presumed prejudicial for *Strickland* purposes because the Court has previously said the impacts of structural errors cannot be measured and it would therefore be impossible to know if counsel's deficiency changed the outcome of the case. But this ignores the compromise standard for prejudice set forth in *Strickland*. As detailed *supra* at pp. 4-5, Petitioner does not need to show that error resulting from counsel's deficiency was outcome determinative. Rather, Petitioner needs only to "undermine the confidence" in the trial by meeting a lower threshold – showing a "reasonable probability" that the outcome would have been different. At the very least, this lower and easier-to-meet standard mitigates the need for broad categories where prejudice is presumed. If this generous standard cannot be met, a defendant simply does not deserve relief on a collateral attack of the conviction.

Perhaps anticipating this objection, Petitioner also argues that the broad categories of structural error must be presumed prejudicial in this context because those errors affect the entire framework of the trial and thereby always and automatically undermine confidence in the outcome of the trial. Pet. Br. 19. But there is no reason to think that is true of every circumstance within the broad categories already deemed "structural error."

Consider for example two different results of a deficiency of counsel regarding the right to a public trial: (1) a full closure of all portions of a ten-day trial with

a sealed transcript; and (2) a closure to the family of the defendant of only a few hours during jury selection, with a full public transcript and the presence of a member of the press in the courtroom during the jury selection process.[6] Petitioner's position would require courts to presume prejudice equally in both situations. But that completely ignores the reality that one situation is far more likely than the other to undermine the outcome/reliability of the trial. And it would be a significant stretch to say that the second situation fits within the line of "structural error" cases addressing serious framework problems. *Contrast Gonzalez-Lopez*, 548 U.S. at 150 (finding denial of choice of counsel "bears directly on the framework within which the trial proceeds" because of the "myriad aspects of representation" that combine to affect the trial) (citation omitted). Unlike in *Gonzalez-Lopez*, where it is beyond all doubt that two attorneys would act differently in numerous large and small ways over the course of a trial, it is nothing more than speculation to suggest a prospective juror (or any other person in the courtroom) would have acted differently in any meaningful way during the jury selection process if the courtroom were open to all members of the public.

Indeed, even on direct review, this Court has never held that closure of the courtroom during the jury selection process is a "structural error." The Court's direct review references to the denial of a public trial

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[6] This example is drawn from the facts of a recent case in Arkansas decided by the State Supreme Court. *See Schnarr v. Arkansas*, 2017 Ark. 10, at *8.

constituting structural error are limited to either closure of the actual trial or a closure of pre-trial hearings where testimony is taken from witnesses. *See Waller v. Georgia*, 467 U.S. 39, 46-47 (1984) (emphasizing that "a public trial encourages witnesses to come forward and discourages perjury," that "[t]hese aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence," that "a suppression hearing often resembles a bench trial" insofar as "witnesses are sworn and testify, and . . . counsel argue their positions," and that "[t]he outcome frequently depends on a resolution of factual matters"). There is no reason to assume the Court would come to the same conclusion (even on direct review, let alone collateral attack) where the closure was limited to the jury selection process, as in *Presley v. Georgia*, 558 U.S. 209 (2010), and there was thus far less chance of infection of the overall framework of the trial.

At bottom, *amici*'s point is that broadly conceived categories of error for which prejudice is presumed are inappropriate, unnecessary, and harmful in the context of collateral attacks like ineffective assistance of counsel. Such broad categories would run headlong into *Strickland*'s and *Cronic*'s explicit intention to very narrowly curtail the availability of a presumption. *Amici* do not believe there is any need or justification to expand the availability of a presumption of prejudice beyond the incredibly limited circumstances expressly identified in *Strickland* and *Cronic*. But even if the Court disagreed, it should expand the availability of the presumption surgically, and only after considering

the specific error at issue at a very detailed level. The Court should not decide the issue at the abstract level of an entire category of error (e.g., the right to a public trial) but rather at the more specific level (e.g., the closure during jury selection with the existence of a public transcript). And at that level of specificity, this Court should not presume prejudice from a closure of the jury selection process, especially where, like here, a public transcript of the proceedings exists.

CONCLUSION

For the foregoing reasons, the 38 *Amici* States respectfully request this Court to find in favor of Respondent.

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No. 16-240

IN THE

Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,

vs.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a defendant who claims that his counsel was ineffective for failing to object to a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's deficiency in order to obtain a new trial under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

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IN THE

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KENTEL MYRONE WEAVER,

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COMMONWEALTH OF MASSACHUSETTS,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, defendant seeks to have his murder conviction reversed for a technical error which his

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

attorney did not bring to the attention of the court and which did not affect the fairness of the trial. Reversing judgments on technicalities in this manner is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On August 10, 2003, 15-year-old Germaine Rucker was attacked by a group of men and boys and shot twice, in the head and in the back. One of the younger members of the group was seen running from the area. He pulled a pistol from his pants leg and lost his baseball cap. The cap was later found by the police and matched by DNA to the defendant, Kentel Weaver. The victim was dead when paramedics arrived. See *Commonwealth* v. *Weaver*, 474 Mass. 787, 788-790, 54 N. E. 3d 495, 501-503 (2016).

Defendant was pressed by his mother to tell the truth, and he confessed to her and later to detectives. See *id.*, at 797-798, 54 N. E. 3d, at 508-509.

During jury selection, the large venire made the courtroom very crowded, with standing room only, and "a court officer informed the defendant's mother and those accompanying her that the court room was 'closed for jury selection.' They were also denied entry the second day of empanelment for the same reason. Trial counsel lodged no objection." *Id.*, at 813, 54 N. E. 3d, at 519-520.

The defendant was convicted of murder in the first degree in 2006. Five years later, he made a motion for a new trial, claiming ineffective assistance of counsel in two respects: inadequate investigation of a claim that his statements were coerced and failure to object to closure of the courtroom during jury empanelment. Two different judges heard and rejected the two claims,

and denial of the motion was consolidated with the pending appeal. *Id.*, at 788, 54 N. E. 3d, at 501-502.

The Supreme Judicial Court of Massachusetts directed a modification regarding eligibility for parole because the defendant was a juvenile but otherwise affirmed. See *id.*, at 815, 54 N. E. 3d, at 521. Claims regarding the defendant's statements were the primary issues in the appeal, see *id.*, 799-813, 54 N. E. 3d, at 509-519, but the defendant did not seek certiorari in this Court on these issues. See Pet. for Cert. i.

The motion judge determined and the Supreme Judicial Court agreed that counsel's failure to object to the closure was deficient performance but not prejudicial. See *id.*, at 814, 54 N. E. 3d, at 520. The state high court declined to revise its precedent that a showing of prejudice is required in this area, and it noted that "the defendant has not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice" under the applicable plain error rule. See *id.*, at 815, 54 N. E. 3d, at 520-521.

The defendant filed a petition for writ of certiorari on the latter point, which this Court granted on January 13, 2017.

SUMMARY OF ARGUMENT

Every criminal defendant has a constitutional right to the effective assistance of counsel. *Strickland* v. *Washington* established a performance-and-prejudice test for evaluating all claims that allege ineffective assistance. Under this test, the defendant has the burden to prove both elements of the claim. Every criminal defendant also has a constitutional right to a public trial. If the right to a public trial is erroneously

abridged, *Arizona* v. *Fulminante* holds that such denial constitutes a structural error and is never subject to harmless error review because prejudice to the defendant is presumed.

When counsel inadvertently fails to object to a structural error at trial, it does not automatically relieve a defendant from proving prejudice as demanded by *Strickland*. *Fulminante*'s structural error analysis eliminates the government's ability to prove a lack of prejudice in that context, but it does not eliminate a defendant's burden to prove prejudice in an ineffective assistance of counsel context. Prejudice is an element of the defendant's claim.

There is no need to bring procedurally defaulted structural errors in through the back door of ineffective assistance claims. Procedurally defaulted claims of error are reviewable under a "plain error" analysis, and under that standard, courts are permitted to remedy the error if not doing so would result in a miscarriage of justice. Defendant advanced no argument at trial or on appeal that closure of the courtroom during *voir dire* only was prejudicial or that it caused a "miscarriage of justice." Trial counsel's failure to object to the closure did not affect the fairness or reliability of the proceeding as a whole and overturning defendant's conviction based on such a trivial error would undermine the public's trust in the criminal justice system.

ARGUMENT

I. Requiring a defendant to make an affirmative showing of prejudice due to an attorney's deficient performance at trial is a vital element of an ineffective assistance of counsel claim.

The Sixth Amendment guarantees a panoply of constitutional rights to criminal defendants.[2] The rights at issue in this case involve the right to a public trial and the right to the assistance of counsel. Both rights are personal to the accused and both are violated upon erroneous deprivation.[3] *Presley* v. *Georgia*, 558 U. S. 209, 212 (2010) (*per curiam*) (public trial); *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 379-380 (1979) (same); *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 146 (2006) (right to counsel); *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963) (same).

The Sixth Amendment right to counsel exists to protect the right to a fair trial as guaranteed by the Due Process Clauses. *Strickland* v. *Washington*, 466 U. S.

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2. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const., Amend. VI.

3. The separate right of the public to attend a trial extends beyond that of the accused. *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside Cty.*, 464 U. S. 501, 508 (1984). The press and the public have a First Amendment right to attend the *voir dire* examination of potential jurors in addition to the proceedings themselves. *Id.*, at 510.

668, 684-685 (1984). Counsel's assistance is necessary to the adversarial process. *Id.*, at 685. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Ibid.*

The Sixth Amendment right to a public trial helps to ensure that a defendant is dealt with fairly, to import a sense of responsibility among the attorneys and judge, to encourage the presence of witnesses and to discourage perjury. *Waller* v. *Georgia*, 467 U. S. 39, 46 (1984). The right to a public trial extends to pre-trial suppression hearings and to *voir dire*. *Id.*, at 48; *Presley*, 558 U. S., at 213.

A. Strickland.

In *Strickland*, this Court was asked for the first time to "directly and fully" address the standard for analyzing a claim of "actual ineffectiveness" of counsel's performance. 466 U. S., at 683. Because the lower federal courts and state courts were applying different standards "[w]ith respect to the prejudice that a defendant must show from deficient attorney performance," this Court granted certiorari "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." *Id.*, at 684.

" '[T]he right to counsel is the right to the effective assistance of counsel.' " *Id.*, at 686 (quoting *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970)). Partisan advocacy on behalf of the prosecution and defense is the most effective method of eliciting truth and to " 'promote the ultimate objective that the guilty be convicted and the innocent go free.' " *United States* v. *Cronic*, 466 U. S. 648, 655 (1984) (quoting *Herring* v. *New York*, 422 U. S. 853, 862 (1975)). Truth and

fairness are the overriding reasons for demanding that an attorney's assistance be "effective." *Ibid.*; *Gonzalez-Lopez*, 548 U. S., at 147. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U. S., at 686; see also *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (refusal to cooperate in defendant's perjury is not "prejudice," even if it would have changed the outcome).

With these considerations in mind, this Court developed a two-part test for evaluating ineffective assistance claims. *Strickland*, 466 U. S., at 687. To prove that counsel's performance was "so defective as to require reversal of a conviction," a convicted defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Ibid.*; *Cronic*, 466 U. S., at 658 ("the burden rests on the accused to demonstrate a constitutional violation"). The defendant, as the moving party, has the burden to show both deficient performance *and* prejudice. *Knowles* v. *Mirzayance*, 556 U. S. 111, 122 (2009). No particular order of decision is required. *Strickland*,, *supra*, at 697.

Pursuant to the deficient performance element, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness" in light of all of the surrounding circumstances. *Id.*, at 687-688.[4] Judicial scrutiny is highly deferential and there is a "'strong presumption' that counsel's representation was within the 'wide range' of reason-

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4. Because the Supreme Judicial Court of Massachusetts found that defense counsel's performance was deficient, this brief focuses solely on the prejudice element.

able professional assistance." *Harrington* v. *Richter*, 562 U. S. 86, 104 (2011) (quoting *Strickland*, 466 U. S., at 689).

With regard to the prejudice element, "any deficiencies in counsel's performance *must* be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U. S., at 692 (emphasis added). Thus, a defendant must prove that but for counsel's unprofessional errors there is a reasonable probability that the outcome of the trial could have come to a different result. *Id.*, at 694; *Richter*, 562 U. S., at 104. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra*, at 694. The standard is high, and in those few cases in which an attorney's errors are so significant, reversal is required because the "errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman* v. *Morrison*, 477 U. S. 365, 374 (1986).

> "The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *Gonzalez-Lopez*, 548 U. S., at 147.

In addressing the prejudice requirement, this Court stated that in certain Sixth Amendment contexts, prejudice is presumed and a "case by case inquiry into prejudice is not worth the cost." *Strickland*, 466 U. S., at 692. The actual or constructive denial of counsel is presumed to be prejudicial, as is the state's interference

with counsel's assistance. *Ibid.*; see also *Cronic*, 466 U. S., at 659.[5] In these limited circumstances, "impairments of the Sixth Amendment right . . . are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent." *Strickland*, *supra*, at 692.

Further, the Sixth Amendment right to effective assistance mandates that the accused receive " 'counsel acting in the role of an advocate.' " *Cronic*, 466 U. S., at 656 (quoting *Anders* v. *California*, 386 U. S. 738, 743 (1967)). If defense counsel "entirely fails" to subject the state's case to "meaningful adversarial testing," such as by cross-examination, "the process loses it character as a confrontation between adversaries" is presumptively unreliable, and prejudice is presupposed without further inquiry. *Cronic*, *supra*, at 656-657, 659. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.*, at 659, n. 26.

In the 33 years since *Strickland* and *Cronic* were decided, this Court has not expanded the narrow class of presumptively prejudicial errors and continues to require a showing of prejudice in cases alleging inefficient assistance of counsel. This is because "[t]he government is not responsible for, and hence not able

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5. A limited presumption of prejudice will also be applied when an attorney is burdened by an actual conflict of interest. *Strickland*, 466 U. S., at 692; see also *Cuyler* v. *Sullivan*, 446 U. S. 335, 345-350 (1980); *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978). Prejudice will only be presumed if a defendant shows that counsel " 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Strickland*, 466 U. S., at 692 (quoting *Cuyler*, *supra*, at 350, 348).

to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. . . . Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant *must show that they actually had an adverse effect on the defense*." *Strickland*, 466 U. S., at 693 (emphasis added).

With regard to the right to counsel itself, this Court has said that the right of a criminal defendant to hire and be assisted by counsel of choice is "regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lopez*, 548 U. S., at 147-148; see also *Cronic*, 466 U. S., at 653 ("[l]awyers in criminal cases 'are necessities not luxuries' "). In addition, the failure to appoint counsel to an indigent defendant at all is an obvious and unique constitutional defect hitting directly at the heart of the Sixth Amendment itself, and it is easy for the government to prevent. *Custis* v. *United States*, 511 U. S. 485, 496 (1994); *Strickland*, 466 U. S., at 692.

Thus, if a defendant is denied counsel of choice or counsel at all, the "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, *regardless* of the quality of the representation he received." *Gonzalez-Lopez*, 548 U. S., at 148 (emphasis added). The constitutional error is self-evident and instantly violated. Proving prejudice would be futile because " 'no amount of showing of want of prejudice would cure it.' " *Cronic*, 466 U. S., at 659 (quoting *Davis* v. *Alaska*, 415 U. S. 308, 318 (1974)).

Cases interpreting the right to *effective* assistance of counsel, on the other hand, "impose[] a baseline requirement of competence on whatever lawyer is chosen

or appointed." *Gonzalez-Lopez*, 548 U. S., at 148. Thus, denial of the right to counsel requires a different inquiry from whether that counsel provided effective assistance. The former mandates that a violation of the right occurs, and is thus complete, upon erroneous deprivation, whereas the latter violation occurs only if counsel's mistake(s) caused harm to the defense. *Id.*, at 147. *Strickland* set a high bar and this Court has stated several times that hurdling that bar is not an easy task. *Padilla* v. *Kentucky*, 559 U. S. 356, 371 (2010); see also *Premo* v. *Moore*, 562 U. S. 115, 122 (2011).

As both *Strickland* and *Gonzalez-Lopez* identified, there is the right to counsel and within that right, there is the right to the effective assistance of that counsel. The Sixth Amendment guarantees the right and due process defines the contours of the right. *Gonzalez-Lopez*, 548 U. S., at 147.

B. Fulminante.

In *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), this Court addressed whether the erroneous admission of a coerced confession in violation of the Fifth Amendment was subject to harmless error review. When analyzing the appropriate standard of review, this Court noted that most constitutional errors are subject to such review and do not automatically require reversal of a conviction. *Id.*, at 306; *Chapman* v. *California*, 386 U. S. 18, 24 (1967) (establishing the harmless error standard).

Cases involving "trial errors," like an involuntary confession, occur during the presentation of the case and can be assessed in the context of other evidence to determine whether its admission "was harmless beyond a reasonable doubt." *Fulminante*, 499 U. S., at 307-308. Certain enumerated "structural defects" or

"structural errors," however, are not amenable to harmless error analysis because these affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.*, at 310; *Neder* v. *United States*, 527 U. S. 1, 8 (1999).

These structural errors include the total denial of counsel, a biased trial court judge, unlawful exclusion of members of defendant's race from a grand jury, denial of the right to self-representation, denial of a public trial, and the denial of the right to trial by jury due to a defective reasonable doubt instruction. *Fulminante*, 499 U. S., at 309-310; *Gonzalez-Lopez*, 548 U. S., at 149 (cases cited). " 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' " *Fulminante*, *supra*, at 310 (quoting *Rose* v. *Clark*, 478 U. S. 570, 577-578 (1986)).

The public trial right has deep historical roots and operates as "an effective restraint on possible abuse of judicial power" and "as a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U. S. 257, 270 (1948). However, the right to a public trial is not absolute and excluding the public is not always erroneous. *Waller*, 467 U. S., at 45; *Presley*, 558 U. S., at 215. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, *supra*, at 45. *Voir dire* may also be closed to the public upon a court's finding that safety concerns or the threat of improper communications with jurors justify the closure. *Presley*, *supra*, at 215. Thus, because the erroneous deprivation of a defendant's right to a public trial is an enumerated structural error, reversal is required without harmless

error review if the objection was preserved. *Waller*, *supra*, at 49.

C. Strickland v. Fulminante.

Petitioner in this case is arguing that because his attorney did not object to his mother's exclusion from the courtroom during jury selection, his right to a public trial was violated and he need not show he was prejudiced because the underlying error was structural. In other words, his attorney was ineffective because of his inadvertent failure to preserve a structural error.

The flaw in Petitioner's argument, however, is that *Fulminante* concerns the standard of review that courts apply to a select few preserved structural errors and not to ineffective assistance of counsel claims. "The *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one." *Premo*, 562 U.S., at 128; see also *Lockhart* v. *Fretwell*, 506 U. S. 364, 369, n. 2 (1993). *Gonzales-Lopez* sheds light on this distinction. In that case, the issue was whether the trial court's erroneous deprivation of a criminal defendant's paid counsel of his choosing amounted to a structural error entitling the defendant to a reversal of his conviction. 548 U. S., at 142. The Government conceded that the defendant was erroneously deprived of counsel of his choice, but argued that the Sixth Amendment was not violated and thus not "complete" unless the defendant could show that his substitute counsel was ineffective within the meaning of *Strickland*. *Id.*, at 144. This Court rejected the Government's argument, concluding that there is a difference between the right to counsel of choice and the right to effective counsel. *Id.*, at 148. Requiring a defendant to prove that his substitute counsel was ineffective in order to establish a violation of his right

to counsel of choice confuses the two distinct rights. *Ibid.*

The right to counsel of choice guarantees "the right to a particular lawyer regardless of comparative effectiveness" and the right to effective counsel "imposes a baseline requirement of competence in whatever lawyer is chosen or appointed." *Ibid.* After concluding that the erroneous denial of counsel of choice was structural, this Court delved further into the differences between analyzing the right to counsel versus the right to effective counsel. *Id.*, at 150.

> "[T]he requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*. A choice-of counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *Ibid.*

When a glaring structural error occurs, the framework of the entire trial court proceeding is affected. The vehicle by which guilt or innocence was determined was hijacked by constitutional error and renders the trial fundamentally unfair. *Neder*, 527 U. S., at 8. "The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial." *Fulminante*, 499 U. S., at 309-310.

> "It is one thing to recognize that structural errors and defects obviate any requirement that prejudice be shown on direct appeal and rule out an application of the harmless error rule in that context. It is another matter entirely to say that they vitiate the prejudice requirement for an ineffective assistance

claim." *Purvis* v. *Crosby*, 451 F. 3d 734, 740 (CA11 2006).

Strickland seeks to define a constitutional error and in doing so demands the defendant, as the moving party, to prove both deficient performance and prejudice. Prejudice is an element of the defendant's claim.

II. Defaulted claims of structural error should be addressed in "plain error" review, not brought in the back door through ineffective assistance claims.

For the class of claims in which prejudice cannot be realistically assessed, assignment of the burden of showing prejudice effectively determines the ineffective assistance claim once deficient performance has been shown. If the defendant has the burden of showing prejudice and the showing is impossible, no such claims will succeed. If the government has the burden of showing lack of prejudice (harmlessness) and the showing is impossible, all such claims will succeed.

If all such claims succeed, then convictions of clearly guilty criminals will be overturned on grounds that will strike the general public as trivial. The present case is a prime example. The error committed in this case does not remotely call into question the reliability of the trial, *i.e.*, its capacity to produce a just result. See *Strickland* v. *Washington*, 466 U. S. 668, 696 (1984). Reversal in such cases undermines the public's trust in the criminal justice system.

On the other side of the scale, if such underlying errors are not correctable through ineffective assistance claims, they remain correctable through "plain error" rules when justice so requires. The specific requirements for plain error review vary by jurisdiction, but

these rules typically contain enough "play in the joints" to permit courts to avoid miscarriages of justice.

In federal criminal cases, if a defendant makes a timely objection to an error at trial, Federal Rule of Criminal Procedure 52(a) authorizes federal appellate courts to engage in a harmless error inquiry to determine whether the error was prejudicial. *United States* v. *Olano*, 507 U. S. 725, 734 (1993); see also *Lockhart* v. *Fretwell*, 506 U. S. 364, 369, n. 2 (1993) ("Harmless error analysis is triggered only *after* the reviewing court discovers that an error has been committed"). Rule 52(b), on the other hand, gives appellate courts limited authority to correct errors that were not timely raised at trial. *Olano*, *supra*, at 731. Rule 52(b) is discretionary, not mandatory. *Id.*, at 735.

To overcome procedural default in federal courts, Rule 52(b) "allows plain errors affecting substantial rights to be noticed," *Johnson* v. *United States*, 520 U. S. 461, 466 (1997), despite the lack of preservation if (1) there was an error that was not affirmatively waived by the defendant; (2) the legal error is clear or obvious; (3) the error affected the appellant's "substantial rights" in that it affected the outcome of the proceeding; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett* v. *United States*, 556 U. S. 129, 135 (2009) (internal quotation marks omitted). If the first three elements are satisfied, an appellate court has the discretion to remedy the forfeited error after considering the fourth. *Ibid.* In Massachusetts, "unpreserved claims of error [are] reviewed to determine if a substantial risk of a miscarriage of justice occurred." *Commonwealth* v. *LaChance*, 469 Mass. 854, 857, 17 N. E. 3d 1101, 1104 (2014).

Both Rule 52(a) and (b) require a showing of prejudice

> "with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice [under Rule 52(b)]. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. . . . This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights' . . . , Rule 52(b) authorizes no remedy unless the error *does* 'affec[t] substantial rights.' " *Olano*, 507 U. S., at 734-735 (citations omitted; emphasis in original).

Stated another way—under Rule 52(a), if a properly preserved error is not prejudicial to the defendant, it is subject to harmless error review with the burden on the Government to prove harmlessness. While under Rule 52(b), if an unpreserved error *is* prejudicial to the defendant, it is subject to "plain error" review with the burden on the defendant.

Fulminante holds that certain structural errors are not subject to harmless error review. However, "[w]hether an error can be found harmless is simply a different question from whether it can be subjected to plain-error review." *Puckett*, 556 U. S., at 139.

Because the right to a public trial is not absolute, upon objection, a trial court must evaluate the four *Waller* factors to determine whether the closure is necessary.[6] If an appellate court determines that the

---

6. A four-part test applies: the party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect the interest; the trial court must consider reasonable alternatives to the closure; and the trial court must make findings adequate to support the closure. *Waller*, 467 U. S., at 48.

closure was erroneous, the error is considered structural and is not subject to harmless error review. See *United States* v. *Marcus*, 560 U. S. 258, 263 (2010). "Where a defendant raises a properly preserved claim of structural error, this court will presume prejudice and reversal is automatic." *LaChance*, 469 Mass., at 857, 17 N. E. 3d, at 1104.

If the courtroom closure is not objected to, and thus unpreserved, and a defendant raises the issue for the first time on appeal, determining whether the closure was erroneous shifts the burden to the defendant because the claimed error has been procedurally defaulted. In the federal courts, "a right ' "may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." ' " *Johnson*, 520 U. S., at 465 (quoting *Olano*, 507 U. S., at 731 (quoting *Yakus* v. *United States*, 321 U. S. 414, 444 (1944))). "[A]ppellate courts exist solely to determine whether trial courts committed reversible error in proceedings below. An appeal is not a do-over of the original proceeding." Cunningham, Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the Interest of Justice, 11 J. App. Prac. & Process 285, 288 (2010) (footnotes omitted). Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977).

Alerting the trial judge to the alleged error gives the trial court the opportunity to evaluate the alleged error at the time it occurred. *Puckett*, 556 U. S., at 134. "Without a preservation rule, a trial attorney might intentionally keep quiet about an error with the hope of using it, in the event of a loss at trial, as a basis for reversal on appeal." Cunningham, *supra*, at 292; *Puckett*, *supra*, at 134. This is not a hypothetical possibility. Defense counsel actually tried this gambit

in *United States* v. *Turrietta*, 696 F. 3d 972, 975-976 (CA10 2012).

The third prong of the plain error rule is similar to the prejudice prong of *Strickland*, and this Court has not yet found it necessary to decide if this prong should be presumed for structural-error claims reviewed for plain error. See *Puckett*, 556 U. S., at 140-141. The Court has found that the errors coming before it in this posture did not satisfy the fairness-integrity-reputation prong. See *Johnson*, 520 U. S., at 469-470 (failure to submit to jury an element not genuinely disputed); *United States* v. *Cotton*, 535 U. S. 625, 632-633 (2002) (omission of drug quantity from indictment when "essentially uncontroverted").

> "Although a showing (or presumption) of prejudice is necessary to meet this prong, it is not sufficient because not every prejudicial error threatens the fairness and integrity of the proceedings. [Citation.] Rather, the fourth prong is an independent inquiry, more appropriately compared with a miscarriage of justice standard under which a claimed error should not be corrected, unless allowing it to stand would be 'particularly egregious.'" *Turrietta*, 696 F. 3d, at 984.

In the present case, the Supreme Judicial Court of Massachusetts found no plain error because "the defendant has not advanced any argument or demonstrated any facts that would support a finding that the closure subjected him to a substantial likelihood of a miscarriage of justice." 474 Mass., at 815, 54 N. E. 3d, at 521. This holding is consistent with *Johnson*, *Cotton*, and *Turrietta*.

The courtroom closure for jury selection did not affect the fairness of the judicial proceedings as a whole. The defendant was tried and convicted for a murder he

clearly did commit. There is no reason to bend the rules to allow him to raise a minor error to which he did not object and which could have been corrected on the spot if he had objected.

CONCLUSION

The decision of the Supreme Judicial Court of Massachusetts should be affirmed.

April, 2017

Respectfully submitted,

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AND
RIEF

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No. 16-240

In the Supreme Court of the United States

KENTEL MYRONE WEAVER, PETITIONER

v.

COMMONWEALTH OF MASSACHUSETTS

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

BRIEF FOR MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Massachusetts Association of Criminal Defense Lawyers (MACDL), as amicus curiae, submits this brief in support of petitioner Kentel Myrone Weaver. MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL's mission is to preserve the

[1] Both parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

adversary system of justice, to maintain and foster independent and able criminal defense lawyers, and to ensure justice and due process for persons accused of crimes.

MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

SUMMARY OF THE ARGUMENT

When the Commonwealth opposed Mr. Weaver's appeal in the Massachusetts courts, the Commonwealth highlighted the trial courts' historic practice of excluding the public from courtrooms for jury selection in criminal trials. Commonwealth's SJC Br. 56. The Commonwealth's point, of course, was to raise the specter of a flood of similar petitions while the courts were considering Mr. Weaver's case.[2] While the history is certainly correct, it is also remote. Nearly a decade has passed since Massachusetts trial courts stopped the

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[2] Although the Commonwealth invoked this historic practice as part of its argument that trial counsel's performance was not constitutionally deficient, it cited to, among others, cases that highlight the Supreme Judicial Court's finality concerns. These include, for example, *Commonwealth* v. *Morganti*, 4 N.E.3d 241, 247 (Mass. 2014).

practice. Both as a practical matter and as a matter of federal law, prisoners convicted in Massachusetts prior to the change in court practice have largely already exhausted their available appeals.

Mr. Weaver is correct that it will be a rare case in Massachusetts where a new trial must be granted because an attorney's constitutionally deficient performance resulted in unpreserved structural error. Mr. Weaver's case is, however, one such case.

ARGUMENT

DESPITE THE CONCERNS THE COMMONWEALTH SUGGESTED IN THE MASSACHUSETTS SUPREME JUDICIAL COURT, GRANTING MR. WEAVER'S PETITION WILL NOT INVITE A FLOOD OF NEW CHALLENGES

Mr. Weaver states that "the cases in which a presumption of prejudice will result in new trials are doubly unusual, involving both constitutionally deficient performance and a resulting structural error. Cases like that will be few and far between, and granting relief in such limited circumstances will do little, if anything, to imperil 'the public interest in the finality of verdicts.'" Pet. Br. 34 (quoting *Commonwealth* v. *LaChance*, 17 N.E.3d 1101, 1106 (Mass. 2014)). Massachusetts is no exception. While Mr. Weaver's 2006 trial took place at a time when Massachusetts trial courts regularly closed the court for jury selection, court practice changed shortly after Mr. Weaver was convicted. Given the practical and statutory limits on direct and habeas appeals, few Massachusetts prisoners today will have an unbarred claim. As a result, the specter that the Commonwealth implicitly invoked should not be used to deny Mr. Weaver relief. See *Schriro* v. *Landri-*

gan, 550 U.S. 465, 500 (2007) (Stevens, J., dissenting) ("[D]oing justice does not always cause the heavens to fall."). Mr. Weaver's petition poses no threat to finality in the Commonwealth other than to the finality of his own unconstitutionally obtained conviction.

a. Massachusetts trial courts used to have a "long-standing practice * * * of closing the court room during jury empanelment." *Commonwealth* v. *Alebord*, 4 N.E.3d 248, 252 (Mass. 2014). In these courts, the "practice, custom and procedure on a routine basis was that when jurors were brought into the court room, due to the size and configuration of the court room, anyone that was not directly connected with the case, * * * [was] told to leave and stand in the hallway during the jury selection process." *Commonwealth* v. *Morganti*, 4 N.E.3d 241, 244 (Mass. 2014) (quoting testimony of defense counsel regarding practice in Brockton Superior Court); see also *Commonwealth* v. *Cohen*, 921 N.E.2d 906, 915 (Mass. 2010) (noting that it was the practice in Norfolk Superior Court to exclude the public from jury selection if there was no room for spectators); *Commonwealth* v. *Lopes*, 51 N.E.3d 496, 497 (Mass. App. Ct.) (noting that "court rooms around this Commonwealth routinely were closed during jury empanelment"), rev. denied, 65 N.E.3d 661 (2016). In fact, courtroom closure during jury selection, to which defense attorneys failed to object, was a "culture," of which "defense attorneys were a part." *Morganti*, 4 N.E.3d at 244 (quoting testimony of lead attorney at county office of the state's Committee for Public Counsel Services); see also *Lopes*, 51 N.E.3d at 497 ("In many such cases, because of the longstanding culture of

these court houses, no contemporaneous objection was made to these closures.").

b. In 2007, the First Circuit affirmed that a defendant's Sixth Amendment right to a public trial applied to jury selection. *Owens* v. *United States*, 483 F.3d 48 (1st Cir. 2007). In *Owens*, the appeals court held that the closure of the courtroom for the entire day of jury selection was a denial of the defendant's public trial right, and rejected the argument that the over-crowding of the courtroom provided a blanket justification for such courtroom closure. *Id.* at 62-63. In short, *Owens* rejected the common practice in Massachusetts criminal trial courts. In 2010, both the Supreme Judicial Court and this Court affirmed as well that the right to a public trial applied to jury selection. See *Presley* v. *Georgia*, 558 U.S. 209, 213 (2010); *Cohen*, 921 N.E.2d at 918. *Cohen* stated further that the violation of the right to a public trial at jury selection would constitute a structural error, and thus a defendant would not have to show prejudice to obtain relief. 921 N.E.2d at 926-927.

c. It has been ten years since the *Owens* decision raised awareness in Massachusetts that the public must be admitted to jury selection unless the court follows the procedures outlined by this Court in *Waller* v. *Georgia*, 467 U.S. 39 (1984). Given that a decade has passed, defendants tried before *Owens* have completed their direct appeals. Since *Owens* in 2007, or at least since *Cohen* in 2010, it was well known in Massachusetts that the public trial right applied to jury selection and the denial of that right constituted a structural error. Accordingly, as the undersigned amicus has experienced while litigating scores of criminal trials and appeals during the past decade, effectively all Massachu-

setts defendants who desired to raise a public trial claim in a new trial motion on collateral review—hoping to benefit from the presumption of prejudice—had already done so by 2014, the year in which the Supreme Judicial Court in *LaChance* foreclosed the ability to raise a public trial claim on collateral review without showing prejudice. 17 N.E.3d at 1106 (holding that prejudice must be shown in a claim for ineffective assistance of counsel even where such ineffectiveness causes a structural error).

Because most defendants who were denied a public jury selection before *Owens* and *Presley* have by now exhausted their direct appeals and other state post-conviction options, the avenue left for the majority of them is a federal habeas petition. However, even those defendants are in turn limited by the one year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, a state prisoner "ordinarily has one year to file a federal petition for habeas corpus, starting from 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1929 (2013) (quoting 28 U.S.C. 2244(d)(1)(A)). The "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending" is "not counted" towards that period of limitations. 28 U.S.C. 2244(d)(2). These defendants would have to have kept the direct review of their cases open for nearly a decade (not including any state post-conviction or collateral review) to satisfy AEDPA's statute of limitations.

d. Furthermore, it is unlikely that there were a significant number of cases tried in Massachusetts state courts after *Owens* in which the public was excluded from jury selection. Shortly after the First Circuit stated explicitly in *Owens* that the public could not be excluded wholesale from jury selection, the Massachusetts Administrative Office of the Trial Court held training for Massachusetts state court judges, in which the Administrative Office made clear that jury selection must be open to the public. This triggered a widespread change in trial court practice, all but eliminating the possibility of widespread public trial claims in cases tried after that point. See, *e.g.*, *Commonwealth* v. *Perez*, No. 05-947 (Mass. Super. Ct. Dec. 2, 2010), slip op. 4-5 ("At some point, a few years ago, as a result of court-wide training * * * [this court] became aware that the exclusion of spectators was disfavored at any time. From that point on, to the extent that he was aware that spectators were being excluded during [e]mpanelment, [the court] did not permit such exclusion."). Indeed, the data bears this out. The undersigned amicus reviewed all of the habeas petitions—both those pending and those resolved—filed in the District of Massachusetts since the *Owens* decision in 2007, and found that only about 3.5% (22 out of 651 available for review) of those habeas petitions, whether pending or not, raised the issue of trial counsel's ineffectiveness for failing to object to the closure of the courtroom at jury selection.

CONCLUSION

This Court should reverse the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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KENTEL MYRONE WEAVER,

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v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and with its affiliates represents more than 40,000 attorneys. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the just, proper, and efficient administration of justice. It frequently appears as an amicus curiae before this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal defense system as a whole.[1]

SUMMARY OF ARGUMENT

The right to a public trial is too important to be lost through counsel's incompetence. Openness to the public has been a fundamental element of criminal trials for centuries. A trial conducted behind closed

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' consents to the filing of this brief have been filed with the Court.

doors, like a trial without defense counsel or a jury, is simply not a trial in the Anglo-American tradition. Like the right to counsel and the right to a jury, the right to a public trial should have to be affirmatively waived before it is relinquished. It should not be lost merely because counsel is too incompetent to object to a courtroom closure.

For centuries, courts and commentators have emphasized the importance of public trials. In England, the ability of the public to attend trials was considered "one of the essential qualities of a Court of Justice." *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (K.B. 1829). In the United States, the right to a public trial "p' ays as important a role in the administration of justice today as it did for centuries before our separation from England." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

This Court has recognized that the right to a public trial is essential to the integrity of the criminal justice system. The presence of spectators ensures that witnesses tell the truth, because they know that any member of the public could expose a lie. Openness to the public provides a powerful incentive for the judge and the jury to act impartially, for the prosecutor not to exceed the bounds of lawful advocacy, and for personnel like bailiffs and court reporters to do their jobs faithfully, because all these actors know that they are under constant public scrutiny. The ability to attend trials gives the public assurance that justice is being done and prevents the public from losing confidence in the courts even when the outcome of a trial is unpopular. Public trials are unique occasions for educating the public

about the criminal justice system. For all these reasons, openness to the public is a crucial element of a criminal trial.

The right to a public trial is too important to be forfeited by accident, merely because defense counsel is too inept to object to a courtroom closure. The right to a public trial should be grouped with similar rights that must be affirmatively waived before they can be lost, such as the right to counsel, the right to plead not guilty, the right to a jury, and the right to testify. Like these rights, the right to a public trial is a constitutive element of the trial itself. It is not a mere tactical matter, such as whether to object to inadmissible evidence. The decision below grossly undervalues the right to a public trial because it allows that right to be forever lost whenever defense counsel makes a mistake.

ARGUMENT

The right to a public trial is too important to be forfeited by counsel's incompetence.

Although the Question Presented in this case is phrased in terms of the right to effective assistance of counsel, the Court's decision will also answer an equally important question—whether the defendant's right to a public trial can be forfeited because of defense counsel's incompetence. Because the prejudice from a courtroom closure is inherently impossible to prove, the decision below means that the right to a public trial will be forever lost if counsel incompetently fails to object to a courtroom closure. Petitioner's view, by contrast, would ensure that counsel

cannot inadvertently forfeit a defendant's right to a public trial.

Petitioner's view is the correct one. The right to a public trial is simply too important to be forfeited by counsel's incompetence. The right to a public trial has always been a fundamental feature of the Anglo-American criminal trial, because it is essential to the integrity of our criminal justice system. Public trials are not just for the protection of the defendant. They also provide valuable benefits for the public and the legal system generally. These benefits should not be lost merely because counsel is too incompetent to realize their importance.

A. The right to a public trial has always been recognized as fundamental to the integrity of the criminal justice system.

The right to a public trial has been a fundamental structural feature of our criminal justice system for centuries. Courts and commentators have consistently emphasized the importance of public trials, because public trials are essential to the integrity of the criminal justice system.

1. For centuries, courts and commentators have emphasized the importance of public trials.

The right to a public trial has been a basic structural feature of the Anglo-American criminal trial since before the Norman Conquest. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984). In the 16th century, Thomas Smith, a Member of Parliament and an advisor to Elizabeth I, boasted that

English trials were conducted "not after the fashion of the civill law but openly," so that "as many as be present may heare what ech witnesse doeth say." Thomas Smith, *De Republica Anglorum* 99 (Mary Dewar ed. 1982) (originally published in 1583; spelling not modernized). Smith emphasized that this was no innovation. Not only had it already been the rule in England for centuries, but ancient Roman practice had been the same. "Although this may seem strange to our civillians nowe," he noted, "yet who readeth *Cicero* and *Quintillian* well shall see there was no other order or maner of examining witnesses or deposing among the Romans in their time." *Id* at 99-100.

English judges and lawyers of the 17th, 18th, and 19th centuries consistently placed great importance on the openness of the criminal trial. Matthew Hale, Chief Justice of the King's Bench in the 1670s (among other positions), declared that evidence must be given "in the open Court, and in the Presence of the Parties, their Attorneys, Counsel and all Bystanders." Matthew Hale, *The History of the Common Law of England* 253 (2d ed. 1716). John Hawkes, who was Solicitor General at the end of the 17th century, likewise insisted that "all matters of law are, or ought to be transacted publicly." 11 T.B. Howell, *A Complete Collection of State Trials* 460 (1816). Blackstone's ubiquitous *Commentaries* stressed "[t]his open examination of witnesses *viva voce*, in the presence of all mankind," as a crucial element of a criminal trial. 3 William Blackstone, *Commentaries on the Laws of England* 373 (1768).

"[W]e are all of opinion," the King's Bench observed in the early 19th century, "that it is one of the essential qualities of a Court of Justice that its proceedings should be public." *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (K.B. 1829). Even Jeremy Bentham, who disdained many common law modes of procedure, extolled "[t]he advantages of publicity" for the criminal trial. 1 Jeremy Bentham, *Rationale of Judicial Evidence* 522 (1827).

Colonial Americans followed the English practice of conducting criminal trials in public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 567-69 (1980). Historical evidence suggests that trials often attracted large numbers of spectators:

> The community turned out to observe criminal trials for serious offenses. Curiosity played a part, as did concern for the victim of the crime or the defendant. Criminal trials were also markers of what a community would and would not tolerate from its members. By gathering at the trial, the community gave visible testimony to its shared values.

Peter Charles Hoffer, *Law and People in Colonial America* 116 (rev. ed. 1998).

The Bill of Rights shifted the foundation of the public trial guarantee from the common law to the Constitution. For the Founders, "[h]istory had proven that secret tribunals were effective instruments of oppression." *Estes v. Texas*, 381 U.S. 532, 539 (1965). The Founders were well aware of "the notorious use of this practice by the Spanish Inquisition, ... the excesses of the English Court of Star Chamber, and ...

the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty." *In re Oliver*, 333 U.S. 257, 268-69 (1948) (footnotes omitted). As Justice Black observed, "it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials." *Feldman v. United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting).

The right to a public trial thus continued to be as fundamental to American criminal trials as it had long been in England. Justice Story explained that the Sixth Amendment's Public Trial Clause "does but follow out the established course of the common law in all trials for crimes. The trial is always public." Joseph Story, *Commentaries on the Constitution of the United States* 664 (1833). Later American commentators likewise emphasized the importance of the fact that criminal trials were open to the public. *See, e.g.*, Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 312 (1868) ("It is also requisite that the trial be *public*."); 3 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 894 (2d ed. 1923) ("a trial must be conducted in such a way as to allow the access of the general public").

The Court has accordingly recognized that the right to a public trial "plays as important a role in the administration of justice today as it did for cen-

turies before our separation from England." *Press-Enterprise*, 464 U.S. at 508. "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers*, 448 U.S. at 573. The right to a public trial is one of our oldest and most universally valued legal traditions.

2. Public trials protect the integrity of the criminal justice system in several ways.

For centuries, the right to a public trial has been understood to protect the integrity of the criminal justice system. The right to a public trial is not just for the benefit of the defendant; it is also for the benefit of the public at large. This is why "[t]he public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. 209, 214 (2010).

Public trials serve several important purposes.

First, the presence of spectators keeps witnesses honest. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (noting that a public trial "discourages perjury"). "[T]he publicity of the examination or deposition operates as a check upon mendacity," Bentham explained. "Environed, as [the witness] sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues." 1 Bentham, *Rationale of Judicial Evidence* at 522 (internal quotation marks omitted). For Hale, "[t]he Excellency of this open Course of Evidence" was that it forced wit-

nesses to tell the truth, unlike secret trials, "where oftentimes Witnesses will deliver that which they will be asham'd to testify publickly." Hale, *History of the Common Law*, at 254. *See also* 3 Blackstone, *Commentaries*, at 373 ("a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal"); 3 Wigmore, *Treatise*, at 892 (observing that the presence of spectators "produces in the witness' mind a disinclination to falsify").

Second, the presence of spectators provides a powerful incentive for the judge and jury to act impartially, and for the prosecutor not to exceed the bounds of proper advocacy. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Oliver*, 333 U.S. at 270. As Bentham memorably put it, publicity "keeps the judge himself, while trying, under trial." 1 Bentham, *Rationale of Judicial Evidence*, at 523. When jurors are aware that they are being scrutinized by the public, they are "keenly alive to a sense of their responsibility and to the importance of their functions." Cooley, *Constitutional Limitations*, at 312. The Court has accordingly observed that one purpose of a public trial is "ensuring that judge and prosecutor carry out their duties responsibly." *Waller*, 467 U.S. at 46.

Third, the presence of spectators ensures that other court personnel, such as court reporters and bailiffs, also carry out their assigned tasks properly. Publicity has served as a check on inaccurate reporting for centuries. In proceedings not governed by a

requirement of openness, Hale noted, "oftentimes, yea too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dressing of it up in his own Terms, Phrases and Expressions." Hale, *History of the Common Law*, at 254. When spectators can observe the trial, security personnel know not to treat the defendant more roughly than is warranted, because any misbehavior on their part will be on public display.

Fourth, a public trial gives the public assurance that justice is being done. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise*, 464 U.S. at 508. *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process"). A trial conducted behind closed doors would be viewed with suspicion, especially when an unpopular defendant is acquitted or a popular one convicted. "A result considered untoward may undermine public confidence," the Court has explained, "and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Richmond Newspapers*, 448 U.S. at 571. For this reason, "the appearance of justice can best be provided by allowing people to observe it." *Id.* at 572.

Fifth, public trials are an essential component of democratic accountability. For better or worse, judges and district attorneys are elected in most states. If the voters could not watch these elected officials perform their duties, the voters' choices would be even less informed than they are now.

Finally, public trials are unique occasions for educating the public about the criminal justice system. "[B]y publicity, the temple of justice adds to its other functions that of a school," Bentham noted, "a school of the highest order, where the most important branches of morality are enforced by the most impressive means." 1 Bentham, *Rationale of Judicial Evidence*, at 525. The Court has likewise concluded that the public's ability to attend trials "affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *Richmond Newspapers*, 448 U.S. at 572 (citation and internal quotation marks omitted). *See also Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 428 (1979) (Blackmun, J., dissenting) ("Public judicial proceedings have an important educative role.").

These purposes served by the right to a public trial are hardly controversial. They have been cited, again and again, for centuries. They are among the reasons the denial of a public trial is a structural error, *Waller*, 467 U.S. at 49 n.9, like the denial of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the denial of the reasonable doubt standard, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *See generally United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006). Openness to the public is a crucial element of a criminal trial.

B. The right to a public trial should not be inadvertently forfeitable through counsel's incompetence.

The right to a public trial is too fundamental to be frittered away by a defense lawyer who incompetently fails to object to a courtroom closure. The right should have to be affirmatively waived by the defendant. At the very least, the forfeiture of a public trial should be a *decision* made by defense counsel, not the accidental by-product of counsel's neglect.

While some rights can be forfeited through counsel's failure to object, others must be affirmatively waived by the defendant. *Gonzalez v. United States*, 553 U.S. 242, 247-49 (2008); *New York v. Hill*, 528 U.S. 110, 114-15 (2000). In the latter category are "fundamental rights," including the right to counsel, *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938), the right to plead not guilty, *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966), the right to avoid double jeopardy, *Green v. United States*, 355 U.S. 184, 191-92 (1957), the right to a jury, *Jones v. Barnes*, 463 U.S. 745, 751 (1983), the right to testify, *Rock v. Arkansas*, 483 U.S. 44, 53 n.10 (1987), and the right to appeal, *Florida v. Nixon*, 543 U.S. 175, 187 (2004).

These "fundamental" rights cannot be forfeited through counsel's mere failure to object; they must be affirmatively waived by the defendant. "Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 237 (1973).

As the Court has emphasized, with respect to these fundamental rights, "[w]e have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'" *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990).

By contrast, the rights that can be forfeited by counsel's failure to object are "trial management matters." *Gonzalez*, 553 U.S. at 249. They are "tactical decision[s]," *id.* at 250, such as whether to object to inadmissible evidence, *Henry v. Mississippi*, 379 U.S. 443, 451 (1965), whether the defendant should be personally present at an in-chambers conference between the judge and a juror, *United States v. Gagnon*, 470 U.S. 522, 528 (1985) (per curiam), and whether a magistrate judge should preside over jury selection, *Peretz v. United States*, 501 U.S. 923, 936 (1991). These tactical decisions are for defense counsel to make, so defense counsel's failure to object constitutes a forfeiture.

Such decisions must often be made quickly: "The adversary process could not function effectively if every tactical decision required client approval." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). Moreover, such decisions often require knowledge and experience that most defendants do not possess. *Gonzalez*, 553 U.S. at 249-50. For these tactical matters, "the defendant is deemed bound by the acts of his lawyer-agent." *Hill*, 528 U.S. at 115 (citation and internal quotation marks omitted). If defense counsel fails to object, the right is forfeited.

The Sixth Amendment right to a public trial is fundamental, not tactical. Like the right to counsel or the right to a jury, the right to a public trial is one of the constituent elements of the trial itself. It is not a mere matter of "trial management," *Gonzalez*, 553 U.S. at 249; rather, it is a part of the trial's very structure. A trial conducted behind closed doors, like a trial without defense counsel or a jury, is simply not a trial in the Anglo-American tradition. Before the courtroom may lawfully be closed without the showing required by *Waller*, the defendant should have to knowingly and intelligently waive his right to a public trial. The right to a public trial should not be forfeited by counsel's failure to object to the closure.

Moreover, the decision whether to waive a public trial is akin to deciding whether to waive a jury or to waive the right to testify. It is a decision normally made only once, and a decision normally made when the defendant and counsel can take the time to consider the costs and benefits of a waiver. It is quite unlike the tactical decision whether to object to evidence, a decision that must normally be made very quickly and requires legal training to understand fully. The right to a public trial should thus have to be waived; it should not be forfeited by a failure to object.

It bears remembering that defendants and their families often have an interest in keeping the courtroom open even when defense counsel does not. Just as public scrutiny keeps judges and prosecutors on their toes, it does the same for defense lawyers. Most criminal defendants have counsel appointed for

them. Their lawyers are strangers they are meeting for the first time. Defendants and their families are well aware that the source of their lawyer's paycheck is the same government that employs the prosecutor and the judge. They know that defense counsel works each day with the prosecutor and the judge in the same courtroom. Defendants and their families sometimes harbor suspicions that appointed counsel's true allegiance is to the court or to the government rather than to the defendant.

A public trial allows the defendant's family and friends to *see* that defense counsel is in their corner, working for the defendant rather than for the government. If defense counsel were allowed to forfeit the right to a public trial without the defendant's affirmative waiver, the defendant's community could hardly be faulted for viewing the forfeiture as evidence of collusion between defense counsel and the prosecutor, for the purpose of keeping defense counsel's conduct out of sight. If trials could be closed without the defendant's affirmative consent, trials would thus lack "the appearance of fairness so essential to public confidence in the system." *Press-Enterprise*, 464 U.S. at 508.

The Court has never addressed whether the Sixth Amendment right to a public trial is a fundamental right that must be affirmatively waived or a tactical right that can be forfeited by counsel's failure to object to a courtroom closure. In *Levine v. United States*, 362 U.S. 610, 619-20 (1960), the Court held that a *Due Process* claim involving the right to a public trial can be forfeited by counsel's failure to object, but the Court expressly left open the analogous

question with respect to a claim under the Sixth Amendment's Public Trial Clause. *Levine* involved a criminal contempt proceeding. The Court explained that "[p]rocedural safeguards for criminal contempts do not derive from the Sixth Amendment. Criminal contempt proceedings are not within 'all criminal prosecutions' to which that Amendment applies." *Id.* at 616. Because Levine's claim was based on the Due Process Clause rather than the Public Trial Clause, the Court reasoned that its "decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a 'public trial.'" *Id.* at 616-17. The Court accordingly held that a defendant can prevail under the Due Process Clause only if his counsel objected to the closure and he suffered prejudice from the closure. *Id.* at 619 ("nor is it urged that publicity would in the slightest have affected the conduct of the proceedings or their result").

A claim based on the Public Trial Clause, by contrast, *does* turn on the "absolute right to a public trial." Unlike the Due Process Clause, the Public Trial Clause guarantees an open courtroom whether or not the defendant requests one, and whether or not the defendant can show prejudice from the closure of the courtroom. *Waller*, 467 U.S. at 49 n.9. *Levine* thus has no bearing on whether the Sixth Amendment right to a public trial is one of the rights that must be affirmatively waived.[2]

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[2] In passing dicta, the Court has twice referred to this passage from *Levine*, and even there the Court avoided characterizing *Levine* as having any bearing on the forfeitability of a claim

Moreover, *Levine* was decided back in 1960, when Public Trial Clause jurisprudence looked nothing like it does today. When *Levine* was decided, the Court had not yet articulated the distinction between structural errors and ordinary trial errors. The Court had not yet determined whether a defendant must show prejudice to prove that he has been denied the right to a public trial. The Court had not yet established the factual findings a trial court must make before closing the courtroom, or even the legal principles governing the relevance of those findings.

Now, of course, the surrounding legal landscape is completely different. The Court has made clear that the denial of a public trial is a structural error, and thus that a showing of prejudice is not required. *Waller*, 467 U.S. at 49 n.9. And the Court has instructed trial courts not to close the courtroom without finding that a closure is "no broader than necessary" to advance "an overriding interest that is likely to be prejudiced" by the presence of spectators. *Id.* at 48. Even if *Levine* had addressed the forfeitability of a claim under the Public Trial Clause, any conclusion reached in *Levine* would be ripe for reexamination.

In any event, the Court could resolve the present case without deciding that the Sixth Amendment right to a public trial must be affirmatively waived. The Court could adopt the more limited holding that

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under the Public Trial Clause, as opposed to the Due Process Clause. *Peretz*, 501 U.S. at 936; *Richmond Newspapers*, 448 U.S. at 574 n.10.

if the right to a public trial can be forfeited by counsel's failure to object, that failure must be an intentional *decision* made by counsel rather than the accidental by-product of counsel's incompetence. Such a holding would be consistent with *Levine*, which was careful to emphasize that the defendant was "acting under advice of counsel," 362 U.S. at 620, when he declined to object to the closure of the courtroom. The Court explained that the defendant and his counsel "saw no disregard of a right" when the public was excluded from his criminal contempt proceeding. *Id.* There was not even any allegation in *Levine* that defense counsel had been ineffective. *Levine* was decided on the assumption that counsel, acting competently, had deliberately refrained from objecting during the contempt proceeding, and was raising the issue "only as an afterthought on appeal." *Id.*

Requiring an affirmative waiver from the defendant, or at the very least an intentional decision by defense counsel, before the courtroom may be closed would be commensurate with the historical roots and continuing importance of the Sixth Amendment right to a public trial. The decision below, by contrast, grossly undervalues the right to a public trial. It allows that right to be forever lost whenever defense counsel makes a mistake. We would not allow the right to a jury or the right to testify to be lost so easily. We should not allow it of the right to an open courtroom, which is likewise a fundamental structural feature of the American criminal trial.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

KENTEL MYRONE WEAVER,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee and its attorneys have provided assistance, guidance, and research in First Amendment and freedom of information litigation since 1970. The Reporters Committee frequently represents the interests of the press and the public in cases involving access to judicial proceedings and court records.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

Reporters rely on access to court proceedings to report on matters of public concern. As "surrogates

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), journalists require access to information that enables them to report accurately on the actions of litigants, criminal defendants, prosecutors, and courts in individual cases, and the functioning of the judicial system as a whole — especially information that is as vital to the integrity of the criminal justice system as the process of selecting a jury in a criminal case.

This case concerns an issue critical to both the news media and the public: whether a court may exclude the public from *voir dire* for the sake of administrative convenience, without considering any alternatives to closure, and without identifying a specific, overriding interest in secrecy that overcomes the constitutional presumption of public access to court proceedings in criminal cases.

SUMMARY OF ARGUMENT

The primary issue before the Court is the requirement that a defendant demonstrate prejudice in order to prevail on a claim of ineffective assistance of counsel arising out of his counsel's failure to object to the closure of *voir dire*. Both parties and the Supreme Court of Massachusetts, below, agree that the closure of *voir dire* constituted a structural error in violation of the Sixth Amendment, and Petitioner argues to this Court that prejudice to the defendant should be presumed because of that structural error. *Amici* write to address a separate concern implicated by this case: the fundamental importance to the press and the public of the First Amendment right of access to *voir dire*. The fundamental nature of this right should inform this Court's consideration of whether prejudice should be presumed when the public is denied access to the jury selection process.

Amici agree with Petitioner that an attempt to show prejudice in an individual case would not be able to capture the "great, though intangible, societal loss that flows" from denial of the public trial right under the First and Sixth Amendments. *See* Br. for Pet'r at 19, 31, *Weaver v. Massachusetts*, No. 16-240 (Feb. 27, 2017) (quoting *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984)). As Petitioner argues, open *voir dire* is essential to the fairness of a criminal trial, and to the appearance of justice and integrity in the judicial system. *See id.* at 15–20, 30–32. Jury selection is therefore a matter of importance "not simply to the adversaries but to the criminal justice system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) (*"Press-Enterprise I"*).

We urge this Court to consider, as it addresses whether there is prejudice to Petitioner for purposes of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), its prior precedent recognizing the public's strong, presumptive right to attend *voir dire* under the First Amendment and the harm that would be caused by closing a courtroom without applying this Court's careful tests set forth in *Waller*, *Press-Enterprise I*, and *Presley v. Georgia*, 558 U.S. 209 (2010). The First Amendment interests here are significant because "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) ("*Press-Enterprise II*").[2] In addition to "the Sixth Amendment right to a public trial [which is] personal to the accused," the First Amendment "secures the public an *independent* right of access to trial proceedings." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584–85 (1980) (Brennan, J., concurring in the judgment) (emphasis added). It is undisputed that the First Amendment presumption of public access to criminal court proceedings extends to jury selection, and because this First Amendment right belongs to the public rather than a party, it

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[2] In evaluating a Sixth Amendment claim for public *voir dire* in 2010, this Court first addressed an "initial question": "whether the right to a public trial in criminal cases extends to the jury selection phase of a trial," and answered this question, affirmatively, by looking to the First Amendment issue presented in *Press-Enterprise I*. *See Presley*, 558 U.S. at 212 (citing *Press-Enterprise I*, 464 U.S. at 504). The Court's analysis in *Presley* demonstrates that when a defendant raises a Sixth Amendment claim regarding the closure of *voir dire*, the First Amendment right of access is relevant.

cannot be waived by any party's act or omission. *Press-Enterprise I*, 464 U.S. at 504 (presumption of access applied even when all parties sought closure). Although the Supreme Court of Massachusetts' decision, below, concedes that courtroom closure was a structural error under *Waller*, it ignores the public's First Amendment interest in open jury selection proceedings.

Given the fundamental, structural importance of the First Amendment right of access to *voir dire*, there is a high likelihood of prejudice to the defendant when that right is violated. As Respondent concedes, "this Court has presumed prejudice in the ineffective-assistance context only where the nature of the error creates a high likelihood of prejudice." Br. in Opp'n on Pet. for Writ of Cert. at 13, *Weaver v. Massachusetts*, No. 16-240 (Dec. 2, 2016) (citing *United States v. Cronic*, 466 U.S. 648, 658–66 (1984)). "[This Court] has simply held that, in certain circumstances, an adverse effect is so likely that it may be presumed." *Id.*

ARGUMENT

I. The First Amendment affords a strong presumption of public access to *voir dire*; such access is vital to the fairness of a criminal trial and the integrity of the criminal justice system.

The public *voir dire* right is critically important to safeguarding not only the fairness of individual criminal trials, but the integrity of the criminal justice system as a whole, and the public's confidence in that system. The importance of the right is reflected

in its longstanding history and in the rationale underlying it, as well as in specific, recent examples demonstrating how press coverage and public awareness promote fairness in criminal trials.

A. The history of public access to criminal proceedings demonstrates the public's interest in observing *voir dire*.

Anglo-American court proceedings have been open to the public "from time immemorial." *Richmond Newspapers*, 447 U.S. at 566–67 (quoting E. Jenks, The Book of English Law 73–74 (6th ed. 1967)). Jury selection, in particular, has been public "since the development of trial by jury . . . with exceptions only for good cause shown." *Press-Enterprise I* at 505. One account from the sixteenth century noted that challenges to prospective jurors were conducted "openly, that not only the [jurors], but the Judges, the parties *and as many* [others] *as be present may heare* [sic]." *Id.* at 507 (quoting T. Smith, De Republica Anglorum 96 (Alston ed. 1906)) (emphasis added by the Court).

Based on its "review of the historical evidence," this Court unanimously recognized a First Amendment presumption of access to jury selection more than thirty years ago in *Press-Enterprise I*, a case in which a state court closed most (but not all) of a six-week *voir dire* process in a high-profile murder prosecution. 464 U.S. at 503–04. The closure was sought by both the government and the defense out of concern for juror privacy and the defendant's Sixth Amendment rights. *Id.* Despite the agreement of the parties and partial nature of the closure, this Court found the closure unconstitutional, stating

that "the process of selection of jurors has presumptively been a public process." *Id.* at 505. This presumption of openness "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," which "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 510; *accord Press-Enterprise II*, 478 U.S. at 13–14. In light of the strong presumption of openness, this Court emphasized that closures "must be rare and only for cause shown that outweighs the value of openness." *Id.* at 509.

Although *Press-Enterprise I* addressed the First Amendment right to a public jury selection, this Court has extended the principles in *Press-Enterprise I* to the Sixth Amendment right to a public trial. In *Waller*, the Court adopted the *Press-Enterprise I* test to hold that a defendant's right to a public trial is guaranteed by the Sixth Amendment. 467 U.S. at 46. In *Presley*, the Court again relied on *Press-Enterprise I* along with *Waller* to hold that the Sixth Amendment guarantees a public jury selection process. 558 U.S. at 212–16 (proceeding by summary disposition because "[t]he point is well settled under *Press-Enterprise I* and *Waller*").

B. Public jury selection is an indispensable component of a fair criminal justice system and necessary to ensure public confidence in the judiciary.

The First Amendment's guarantee of openness "is no quirk of history; rather, it has long been recog-

nized as an indispensable attribute" of a criminal trial. *Richmond Newspapers*, 448 U.S. at 569. Jury selection is conducted in public because transparency leads to confidence: citizens in an open society "do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572.

Secrecy in jury selection undermines the public's confidence in the criminal justice system. Without the press acting as a public watchdog over the jury selection process, "suspicions might arise in a particular trial (or in a series of trials) that jurors were selected from only a narrow social group, or from persons with certain political affiliations, or from persons associated with organized crime groups." *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990). Indeed, as this Court recognized in *Press-Enterprise I*, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." 464 U.S. at 508 (citing *Richmond Newspapers*, 448 U.S. at 569–71).

Openness in jury selection promotes not just the appearance of fairness of criminal proceedings, but actual fairness. As a "general rule," "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Waller*, 467 U.S. at 46 n.4 (quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)). And this Court has repeatedly recognized that public access ensures a fairer trial by,

inter alia, promoting honest testimony, allowing unknown witnesses to come forward, and encouraging proper performance by all participants in the trial, *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); by "ensuring that proceedings are conducted fairly" and "discouraging perjury, misconduct of participants, and biased decisions," *Richmond Newspapers*, 448 U.S. at 569; and by keeping triers "keenly alive to a sense of responsibility and to the importance of their functions," *In re Oliver*, 333 U.S. 257, 270 n. 25 (1948) (citation omitted).

Thus, the First Amendment right of access is critical even when it is not obvious that public attendance will make a tangible difference in the outcome of an individual trial. Underscoring the importance of the public trial right, federal courts of appeals have reversed convictions on appeal or granted post-conviction relief when a courtroom was only closed for the announcement of a verdict, *United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997), and where a portion of the trial was conducted after the courthouse had closed and the public could not attend. *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004). Even when jury selection proceedings are "uncontroversial," as they often are, courts recognize that closure threatens the public trial right. *United States v. Gupta*, 699 F.3d 682, 689 (2d Cir. 2011) (relying on *Presley*, *Waller*, and the "exceptional importance of the right to a public trial" to find that *voir dire* closure was not "trivial," even without a showing that closure affected the outcome of the trial). "Indeed, to conclude otherwise would eviscerate the right [to a public trial] entirely." *Id.*

C. *Voir dire* is often newsworthy and news media coverage of *voir dire* promotes fairness in criminal trials.

Recent examples demonstrate that press and public access to jury selection promotes public understanding of the judicial process as well as fairness. Jury selection is often a subject of intense public interest, especially in high-profile criminal cases. *See, e.g.*, Kenneth B. Noble, *A Jury is Chosen to Hear The Simpson Murder Case*, N.Y. Times (Nov. 4, 1994), *at* http://nyti.ms/2l4Pp5z; Masha Gessen, *Jury Selected in Boston Marathon Bombing Trial*, Wash. Post (Mar. 3, 2015), *at* https://perma.cc/8Y6D-SRJP; Scott Malone, *Jury Selection Starts in Boston Murder Trial of 'Whitey' Bulger*, Reuters (Jun. 4 2013), *at* https://perma.cc/M3VN-PP6J; Bernard Vaughan, *Trial of Madoff Employees in New York Begins with Jury Selection*, Reuters (Oct. 8, 2013), *at* https://perma.cc/2Q4P-WGLN; Rob Shaw, *Case Questions Drag Out Casey Anthony Jury Selection*, Tampa Bay Times (May 12, 2011), *at* http://bit.ly/2kRoAGI; Stephen Young, *Jury Picked as Legal Strategies Emerge on Day One of the John Wiley Price Trial*, Dallas Observer (Feb. 22, 2017), *at* https://perma.cc/LZG2-4T5Z.

Even where the case is not high-profile, *voir dire* proceedings may be newsworthy. For example, information about who appears for jury selection can shed light on the fairness of a trial and larger concerns that implicate the fairness of the criminal justice system as a whole. *See* Tom Jackman, *30 Potential Jurors Didn't Show Up for Va. Murder Trial, So the Judge...Shrugged and Let It Go*, Wash. Post (Feb. 26, 2016), *at* https://perma.cc/GNA6-

DLVM (quoting a jury consultant who claimed that flaws in jury summonses can result in juries that do not reflect the demographics of the community). The news media reports not only on specific jury selection proceedings, but also on general trends in jury selection. *See* Stephanie Clifford, *TV Habits? Medical History? Tests for Jury Duty Get Personal*, N.Y. Times (Aug. 20, 2014), *at* https://nyti.ms/2jE3vNX. Such reporting is even used to teach *voir dire* strategy to law students. *See Voir Dire: Voir Dire in the News*, University of Missouri School of Law Library Guides (updated May 27, 2016), *at* http://bit.ly/2ldYY33.

II. The First Amendment presumption of public access to *voir dire* can be overcome only by compelling interests not present here.

Under the First and the Sixth Amendments, "individualized determinations are *always* required before the right of access may be denied: 'Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 n.20 (1982) (quoting *Richmond Newspapers*, 448 U.S. at 581).

Here, the "sole reason" the trial court denied the right of access was the "crowded condition" of the courtroom. *Com. v. Weaver*, 474 Mass. 787, 814 (2016). But "[a] room that is so small that it cannot accommodate the public is a room that is too small to accommodate a constitutional criminal trial." *Presley v. State*, 285 Ga. 270, 274 (2009) (Sears, C.J., dissenting), *judgment rev'd*, 558 U.S. 209 (2010) (favorably citing the dissenting opinion of Chief Jus-

tice Sears). Another judge noted that attempting to use "insufficient courtroom capacity" as an "excuse" for closure "do[es] not withstand even the most casual scrutiny." *United States v. Gupta*, 650 F.3d 863, 872 (2d Cir. 2011) (B.D. Parker, Jr., C.J., dissenting), *opinion vacated and superseded*, 699 F.3d 682 (2d Cir. 2012) (finding that closure of *voir dire* without making *Waller* findings was not trivial); *see also Gibbons v. Savage*, 555 F.3d 112, 117 (2d Cir. 2009) ("Even if the number of prospective jurors equaled or exceeded the number of seats in the spectator section of the courtroom, that was not sufficient justification to eject the only spectator from the courtroom.").

But even when other concerns are asserted as a basis for closure, courts must be demanding where the public's First Amendment right of access applies. "The First Amendment right of access cannot be overcome by the conclusory assertion that [open proceedings] might deprive the defendant" of the right to a fair trial. *Press-Enterprise II*, 478 U.S. at 15. Closure requires a showing of a "compelling" need under the First Amendment, supported by "specific, individualized findings articulated on the record before closure." *United States v. Antar*, 38 F.3d 1348, 1359 (3rd Cir. 1994) (citations omitted). For example, the Seventh Circuit, examining the First Amendment right, found that a trial court "failed to establish a 'threat' to the interest in an impartial jury" because it "failed to question potential jurors as to their awareness of the media coverage of the *voir dire*, or engage in any other inquiry to support its conclusion that the 'integrity of the process' was infected." *United States v. Peters*, 754 F.2d 753, 761 (7th Cir. 1985). Similarly, the generalized, specula-

tive finding that jurors "might be less candid if questioned in public" is insufficient to justify closure because "if this general theory of potential prejudice were accepted . . . all testimony could be taken in secret." *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982).

Because of this high standard, the presumption of public access to *voir dire* will be overcome only in extreme cases, such as when the "interrogation touches on deeply personal matters that [a] person has legitimate reasons for keeping out of the public domain." *Press-Enterprise I*, 464 U.S. at 511; *compare In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990) (finding the possibility that *voir dire* would "infringe upon the venire members' privacy" insufficient). In those rare cases, "the particular interest, and threat to that interest, must be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Presley*, 558 U.S. at 215 (quoting *Press-Enterprise I*, 464 U.S. at 510). The decision below, however, permits closure without any individualized determination made on the facts of the case, creating a rule so broad that, as the Georgia Supreme Court Chief Justice pointed out in that court's *Presley* decision, a court could close jury selection "in *every criminal case* conducted in this courtroom whenever the trial judge decides, for whatever reason, that he or she would prefer to fill the courtroom with potential jurors rather than spectators." *Presley*, 285 Ga. at 276 (Sears, C.J., dissenting).

III. Parties cannot waive the public's First Amendment right of access; courts must safeguard the independent interests of the public in open criminal proceedings.

The structural error here is unique because it implicates the public's constitutional right of access to *voir dire*. The public cannot practically assert the right in each and every criminal case, and its interests will not be protected if the parties choose not to object. Accordingly, this Court has established that it is incumbent on trial courts themselves to protect the public's right.

Here, in addition to relying on an insufficient ground to justify closure, the trial court erred in failing to consider alternatives to closure of *voir dire*. Although defense counsel did not timely object to closure, "it was still incumbent upon [the court] to consider all reasonable alternatives to closure." *Presley*, 558 U.S. at 216. Indeed, this Court has made clear that trial courts must "consider alternatives to closure even when they are not offered by the parties." *Id.* at 214; *see also Waller*, 467 U.S. at 48; *Press-Enterprise I*, 464 U.S. at 513.

The trial court below would not have needed to look far for reasonable alternatives to closure as this Court has already provided a number of them. Noting that "courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," this Court has suggested "reserving one or more rows for the public; [or] dividing the jury venire panel to reduce courtroom congestion . . ." *Presley*, 558 U.S. at 215. The trial court does not have to exhaust every conceivable alternative to clo-

sure, but it must consider reasonable alternatives, including those expressly suggested by this Court. *See Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1049 (D.C. Cir. 1987) (reversing closure of *voir dire* where court failed to consider an alternative "expressly contemplate[d]" in *Press-Enterprise I*).

This requirement to independently consider alternatives applies to both First Amendment analysis under *Press-Enterprise I* and Sixth Amendment analysis under *Waller*. But it takes on added importance in the First Amendment context because judges are the guardians of the "independent public interest in an open courtroom." *Tinsley v. United States*, 868 A.2d 867, 879 (D.C. 2005); *see also Richmond Newspapers*, 448 U.S. at 585 (Brennan, J., concurring in the judgment) (recognizing that the First Amendment "secures the public an independent right of access"). Thus, trial courts should not "be absolved from considering even the most obvious reasonable alternatives to exclusion of the public that may be available merely because the parties have failed to propose them." *Tinsley*, 868 A.2d at 879. In the First Amendment context, "there is a risk that the only parties present—the prosecutor and the defendant—may agree that closure is proper, leaving the public's interest unrepresented unless the trial court assumes the responsibility of protecting that interest." *Ayala v. Speckard*, 131 F.3d 62, 74 (2d Cir. 1997) (Walker, J., concurring).

No party can waive the public's independent First Amendment right of access to a criminal proceeding. Nor can the public interest in openness apply only when a member of the press or the public is in attendance and rises to object and offer alternatives to

closure of the courtroom. Where the trial court fails to fulfill its independent obligation to safeguard the public interest, a fundamental, structural error has occurred. This results in a high likelihood of prejudice to the defendant, and eviscerates the guarantee of public access to *voir dire*.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse and remand this case.

Respectfully submitted,

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RECORD AND BRIEFS

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KENTEL MYRONE WEAVER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* THE STEIN CENTER FOR LAW AND ETHICS, *ET AL.*

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INTEREST OF *AMICI CURIAE*

The **Louis Stein Center for Law and Ethics**[1] at Fordham University School of Law[2] examines the critical role of lawyers in building a more just society, and explores how ethical values inform and improve the legal profession. The Stein Center supports a wide range of conferences, publications, and independent research.

Additional *amici curiae* are professors, practitioners, experts, and institutions in the field of legal ethics and criminal defense. *Amici* believe that competence is among the most foundational duties that lawyers owe to their clients, critical to safeguarding public trust in the legal profession and criminal justice system. As such, *amici* have an abiding interest in ensuring that courts honor the standards of lawyer competency required by both the Rules of Professional Conduct and the Sixth Amendment. As experts in the area of professional responsibility, *amici* hope to assist the Court in addressing the important issues presented by this case.

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, Petitioner and Respondent have consented to the filing of this brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* have made a monetary contribution to the preparation and submission of this brief.

[2] The views expressed herein are not necessarily those of Fordham University or the Fordham University School of Law.

Because of the large number of *amici*, the names and brief descriptions of additional individuals and institutions are attached as an appendix.

SUMMARY OF ARGUMENT

Kentel Weaver demonstrated to the Supreme Judicial Court of Massachusetts that his criminal trial was infected with structural error; however, the court denied him relief because it misguidedly applied harmless-error analysis. For three reasons, *amici* believe that when ineffective assistance of counsel results in structural error, defendants should not be required to prove prejudice.

First, in failing to object to structural error, a lawyer commits a serious breach of his fiduciary and ethical duties. Allowing such incompetence to go unremedied causes individual defendants real harm and degrades trust in both the legal profession and the criminal justice system as a whole.

Second, precedent urges a presumption of prejudice when ineffective assistance of counsel results in structural error. Like other lawyer errors for which this Court already presumes prejudice, structural errors contaminate the entire proceeding and manifest a serious breakdown of the adversarial process. Moreover, presuming prejudice is necessary when the probability of harm to the defendant is high, but the precise effects of the harm are difficult to measure. Finally, a presumption of prejudice is particularly appropriate because structural errors should be obvious to the court and can be easily prevented during trial.

Third, presuming prejudice will not result in defense counsel purposefully failing to object to structural defects in the hopes of winning a new

trial. Intentionally failing to object to structural error violates the Rules of Professional Conduct and risks defense counsel's professional and reputational interests. Furthermore, the trial court and prosecutors have both the ability and the duty to prevent structural error, putting a nearly insurmountable bar on defense counsel's ability to commit intentional mistakes. Significantly, there is no empirical evidence supporting the concern that defense counsel will intentionally create or ignore structural errors.

Therefore, *amici* respectfully urge this Court to presume prejudice in cases in which ineffective assistance of counsel results in structural error.

ARGUMENT

I. INTRODUCTION

It is beyond dispute that Kentel Weaver was denied his constitutional right to a public trial. During jury selection, the courtroom was fully closed for two days, Pet. App. 39a, in clear violation of the Sixth Amendment of the U.S. Constitution, *Waller v. Georgia*, 467 U.S. 39, 45 (1984); *Presley v. Georgia*, 558 U.S. 209, 213 (2010).

The unconstitutional denial of the public trial right is classified as a "structural defect" because, unlike trial errors, "structural defect[s] affect[] the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In cases where defense counsel raises a timely objection, structural errors are subject to automatic reversal. *Id.* at 309-10. As this Court has observed, "structural defects . . . defy analysis by 'harmless-error' standards," because the precise effects of structural error are difficult to discern. *Id.* at 309. The Supreme Judicial Court of Massachusetts accurately stated this rule when it explained that "[w]here a meritorious claim of structural error is timely raised, the court presumes 'prejudice, and reversal is automatic.'" Pet. App. 39a (quoting *Commonwealth v. Jackson*, 28 N.E.3d 437, 442 (Mass. 2015)).

But Mr. Weaver never received a new trial. Instead, Mr. Weaver's defense counsel failed to object to the courtroom closure—a mistake that the Supreme Judicial Court of Massachusetts found to be "the product of serious incompetency, inefficiency,

or inattention to the defendant's Sixth Amendment right to a public trial" and "not objectively reasonable." Pet. App. 40a (internal quotation marks omitted). Nevertheless, the court demanded that Mr. Weaver demonstrate that his counsel's mistake caused him prejudice, Pet. App. 40a, and denied his motion for a new trial because he could not do so, Pet. App. 40a-41a.

In placing such a burden on Mr. Weaver, Respondent has asked him to prove the impossible. Not only must he show that his counsel was incompetent (which he was), and that his counsel's incompetency resulted in structural error (which it did), but Mr. Weaver must also show that this structural error—which this Court said in *Fulminante* "def[ies] analysis by 'harmless-error' standards"—was not, in fact, harmless. *Fulminante*, 499 U.S. at 310. Defense counsel did not close the courtroom; the trial court did. But in practice, the rule advocated by Respondent means that the denial of Mr. Weaver's constitutional right—in which the defense lawyer, the prosecutor, and the trial judge were equally complicit—cannot be remedied.

Mr. Weaver's lawyer was incompetent, and Mr. Weaver suffered structural error. His injustice was twofold. But the Supreme Judicial Court of Massachusetts refused to grant him relief because, *in addition to* suffering structural error, Mr. Weaver was *also* denied the effective assistance of counsel. Respondent's rule would award less relief as the injury grows. To avoid this perverse result, *amici* urge this Court to grant Mr. Weaver the remedy he would have received but for defense counsel's

incompetent and inexplicable failure to object: a new trial.

II. THIS COURT SHOULD NOT TOLERATE DEFENSE COUNSEL'S GRIEVOUS BREACH OF HIS FIDUCIARY AND ETHICAL DUTIES.

A. Mr. Weaver's Defense Counsel Breached His Duties of Competence and Diligence.

Lawyers owe their clients the fundamental fiduciary duties of competence and diligence. These obligations are foundational to the lawyer-client relationship, and they are enshrined in the American Bar Association's Model Rules of Professional Conduct, the *Restatement (Third) of the Law Governing Lawyers*, and the Rules of Professional Conduct of each of the fifty states. *See* Model Rules of Prof'l Conduct r. 1.1 (Am. Bar Ass'n 2016) ("A lawyer shall provide competent representation to a client."); Model Rules of Prof'l Conduct r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b (2000) ("A lawyer is a fiduciary . . . . Assurances of the lawyer's competence, diligence, and loyalty are therefore vital."); *see also infra* note 4. These obligations extend to every client, regardless of a client's identity, claim, or ability to pay. An indigent defendant deserves no less diligence or competence than the wealthiest corporate client. *See ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard

4-1.1(a) (4th ed. 2015) (defining "defense counsel," to whom the standards uniformly apply, as including lawyers "privately retained, assigned by the court, acting *pro bono* or serving indigent defendants in a legal aid or public defender's office"). Lawyers who fail to provide competent representation to their clients breach both their common law fiduciary duties and their ethical obligations under the Rules of Professional Conduct.

To achieve the minimum competency required by their professional obligations, lawyers must possess and exercise "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rules of Prof'l Conduct r. 1.1. The fact that a lawyer has handled similar matters in the past does not automatically make his future representations competent. Furthermore, a generally competent lawyer may, due to a lapse of attention or understanding, perform incompetently in one particular phase or element of a case. *See United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984) ("[T]he type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well.").

Unquestionably, Kentel Weaver did not receive diligent and competent representation as measured by "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). During the empanelment of Mr. Weaver's jury, court officials closed the courtroom, Pet. App. 38a-39a, in violation of Mr. Weaver's clearly recognized Sixth

Amendment right to a public trial, Pet. App. 39a-40a. But Mr. Weaver's defense counsel raised no objection, Pet. App. 39a, because counsel incorrectly believed that the Constitution would tolerate the closure of a courtroom during *voir dire*, Pet. App. 49a-50a. As the Supreme Judicial Court of Massachusetts explained, Mr. Weaver's lawyer simply "did not understand that the public had a right to be present during the jury empanelment phase of the trial proceedings." Pet. App. 40a.

Such a lapse is inexcusable. One of defense counsel's primary functions is to safeguard his client's constitutional rights, requiring counsel to assiduously pursue avenues of procedural relief. As the ABA Standards for the Defense Function instruct, "Defense counsel should inform the client of his or her rights in the criminal process at the earliest opportunity, and timely plan and take necessary actions to vindicate such rights within the scope of the representation." *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-3.7(a). Because Mr. Weaver's defense counsel so utterly failed in these duties, the Supreme Judicial Court of Massachusetts accurately observed that "counsel's inaction was the product of 'serious incompetency, inefficiency, or inattention to the defendant's Sixth Amendment right to a public trial, and was not objectively reasonable.'" Pet. App. 40a.

Ignorance is no excuse. To maintain minimal competence, defense counsel must possess or acquire the knowledge necessary to mount an adequate defense, especially when constitutional rights are at issue. *See ABA Standards for Criminal Justice:*

Prosecution and Defense Function, Standard 4-3.7(g) ("Whenever defense counsel is confronted with specialized . . . legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert."). Counsel's unawareness of Mr. Weaver's constitutional rights and counsel's resultant failure to object to the closure of the courtroom fall far short of the competence "reasonably necessary for the representation." Model Rules of Prof'l Conduct r. 1.1; *see also Strickland*, 466 U.S. at 688 (holding that the defendant "must show that counsel's representation fell below an objective standard of reasonableness").

B. Allowing Gross Lawyer Incompetence To Go Unremedied Degrades Trust in the Legal Profession and the Criminal Justice System.

Because of his defense counsel's ignorance, Kentel Weaver is now serving a life sentence for a conviction tainted by structural error. But while the interests of justice prescribe relief for Mr. Weaver, the importance of remedying ineffective assistance of counsel goes beyond safeguarding individual defendants' rights. This case is about more than correcting one error; it is about preventing the degradation of the adversarial process. The courts' role in enforcing lawyers' duties of competence and diligence is essential to the health of the criminal justice system and the independence of the legal profession.

A lawyer's duties of competence and diligence are bedrock principles of the legal profession. Our legal system could not function—or, at least, function justly—any other way. An individual without legal training often cannot competently navigate the justice system alone; instead, he relies on a lawyer to make the justice system intelligible and accessible. *See Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b ("[A]dequate representation is often essential to secure persons their legal rights. Persons are often unable either to know or to secure their rights without a lawyer's help."). A client places absolute trust in his lawyer—trust that the lawyer will safeguard the client's most sensitive information, trust that the lawyer possesses the requisite legal knowledge and skill, and trust that the lawyer will zealously pursue his client's interests.

It is vital that the legal profession earn and steward this trust. Individual clients often cannot monitor their lawyers' performance, because "[a] lawyer's work is sometimes complex and technical, often is performed in the client's absence, and often cannot properly be evaluated simply by observing the results." *Restatement (Third) of the Law Governing Lawyers* § 16 cmt. b. Instead, the legal profession as a whole has made a promise to the public: In exchange for the privilege of self-governance, lawyers and judges take responsibility for establishing, following, and enforcing rules of conduct that fulfill lawyers' special fiduciary obligations. As the Preamble to the ABA Model Rules of Professional Conduct explains, "The legal profession's relative autonomy carries with it special

responsibilities of self-government. . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." Model Rules of Prof'l Conduct pmbl. cmt. 12.

In particular, public trust in the integrity of the criminal justice system relies on competent defense counsel. This is why the constitutional guarantee of "the assistance of counsel," U.S. Const. amend. VI, requires more than the mere presence of "a person who happens to be a lawyer," *Strickland*, 466 U.S. at 685; *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). For the adversarial system to work, defense counsel must provide a reliable counterweight to the prosecution. As this Court stated in *Cronic*, "The right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656-57. Only "access to counsel's skill and knowledge" can guarantee defendants have "the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685 (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275 (1942)).

While in principle the Sixth Amendment guarantees effective assistance of counsel, it is the legal community that gives content to this right in practice. As this Court has recognized, "The Sixth Amendment refers simply to 'counsel,' not specifying

particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland*, 466 U.S. at 688.

Strickland's presumption of competency is jeopardized when courts permit ineffective assistance of counsel to result in structural error. Defense counsel must make myriad strategic decisions during the course of their representations, and defendants unacquainted with criminal law and trial tactics must, in the usual case, trust their lawyers to make competent decisions. But the public loses confidence that defense counsel are not committing difficult-to-monitor trial errors when courts fail to redress easily detectible structural errors. The fiduciary promise of the legal profession falls under suspicion when self-regulation so openly and notoriously fails to safeguard defendants' fundamental constitutional rights. Because it is imperative that no court tolerate grave lawyer incompetence that results in structural error, *amici* urge this Court to announce a rule that gives real effect to the fiduciary promise made by lawyers to their clients.

III. THE SAME LOGIC THAT PRECLUDES HARMLESS-ERROR ANALYSIS IN OTHER CONTEXTS COMPELS PRESUMING PREJUDICE WHEN INEFFECTIVE ASSISTANCE OF COUNSEL RESULTS IN STRUCTURAL ERROR.

In keeping with precedent and the judiciary's central role in regulating the legal profession, this Court should presume prejudice when ineffective assistance of counsel results in structural error. The Court traditionally presumes prejudice for three reasons. First, counsel's error contaminates the trial and manifests a "breakdown in the adversarial process." *Cronic*, 466 U.S. at 662. Second, the probability that the error resulted in harm to the defendant is high, but the precise effects of the harm are difficult to measure. *See, e.g.*, *id.* at 658; *Strickland*, 466 U.S. at 692; *Holloway v. Arkansas*, 435 U.S. 475, 488-91 (1978). Third, the trial judge can easily observe, prevent, and remedy the error. *See Strickland*, 466 U.S. at 692. Taken together, these reasons reflect an understanding that public trust is essential to the proper functioning of our legal system and that judges have a substantial role to play in promoting that trust.

A. The Error Infects the Trial and Manifests a "Breakdown in the Adversarial Process."

This Court has frequently presumed prejudice in situations in which counsel's error so contaminated the proceeding that it resulted in a

complete "breakdown in the adversarial process." *Cronic*, 466 U.S. at 662. Whenever a defendant is saddled with counsel who is "[un]able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). To determine whether this risk has manifested, *Strickland* ordinarily imposes a prejudice requirement. The purpose of this requirement is to discern "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. However, in certain circumstances, defense counsel's conduct so dramatically exhibits this risk of injustice and consequent breakdown of the adversarial process that any additional showing of prejudice should be unnecessary. This is the case when ineffective assistance of counsel results in structural error.

Two situations in which the Court already presumes prejudice demonstrate this point. First, this Court presumes prejudice when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. In *Brookhart v. Janis*, 384 U.S. 1 (1966), defense counsel failed to communicate to the defendant that by his agreeing to a *prima facie* trial, he was waiving his right to cross-examination. The Court concluded that the "denial of cross-examination without waiver . . . [was] constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it.*" *Id.* at 3

(emphasis added) (quoting Brief for Respondent at 33).

Second, this Court presumes prejudice when a concurrent conflict of interest "actually affect[s] the adequacy of [a defendant's] representation." *See Cuyler*, 446 U.S. at 349. Because conflicts of interest persist throughout the trial and impair counsel's performance at every stage, the Court has not required defendants to show prejudice. Instead, the Court has assumed that such conflicts automatically undermine the trial's fairness. *See id.* at 349 ("The conflict itself demonstrate[s] a denial of the right to have the effective assistance of counsel." (internal quotation marks omitted)); *Lockhart v. Fretwell*, 506 U.S. 364, 378 (1993) (Stevens, J., dissenting) (explaining that when defense counsel "labors under a conflict of interest that affects her performance, then [the Court] assume[s] a breakdown in the adversarial process that renders the resulting verdict unreliable").

Ineffective assistance of counsel that results in structural error demonstrates a similar contamination of the trial and consequent breakdown of the adversarial process. Structural errors are defects within the "framework" of the trial itself; when they are present, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). Like the denial of the right to cross-examination, structural errors fundamentally undermine the adversarial process by depriving the defendant of essential structural protections.

Moreover, much like conflicts of interest, structural errors persist throughout the trial and "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). This is especially true where the error involves the closure of the courtroom for *voir dire*. The knowledge that the jury was selected in an unconstitutional manner casts serious doubt upon defendant's conviction.

For these reasons, this Court has abandoned harmless-error analysis for structural defects. So long as defense counsel timely objects to the error, prejudice is presumed. Respondent, however, asks this Court to create a special rule for *unpreserved* structural errors, exempting them from the normal presumption. But to do so would be drawing a distinction without a difference. In both cases, the breakdown in the adversarial system is the same. The fact that trial counsel failed to object to the constitutional infirmity when it first occurred changes nothing.

To impose a heightened burden on individuals with ineffective counsel would be contrary to precedent. Just as importantly, such an imposition would undermine the notion that the legal profession and the courts together establish and enforce standards of conduct to maintain public trust. That trust is based on the belief that criminal status is determined through a fair and uniform process rather than procedural Russian Roulette; a client should not be denied essential structural protections merely because she happens to receive or retain a grossly incompetent lawyer.

Lawyers and judges have a duty to "further the public's understanding of and confidence in the rule of law and the justice system." Model Rules of Prof'l Conduct pmbl. cmt. 6. By presuming prejudice in situations in which defense counsel's error results in a breakdown of the adversarial process, the Court recognizes and affirms this responsibility. Because "legal institutions . . . depend on popular participation and support to maintain their authority," *id.*, it is imperative that the Court safeguard a trial's fundamental structural protections. No structural protection is more important to the legitimacy of the judicial process than the right to a public trial. In an open trial, "[t]he public may see [that the defendant] is fairly dealt with and not unjustly condemned, and . . . may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ." *Waller*, 467 U.S. at 46 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979)). Defendants should not need to prove the harm caused by the loss of this right; it is inherent and obvious.

B. Even Though the Precise Harms Are Difficult To Measure, the Probability of Prejudice Is High When the Error Continues To Infect the Proceeding.

The Court has also long recognized the improvidence of requiring defendants to show prejudice in situations where harm is likely albeit difficult to prove. *Strickland*'s prejudice requirement finds its roots in the principle that the

defendant should receive relief when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. However, in cases in which mistakes of counsel result in structural error, the probability of harm to the defendant is both extreme and incalculable. When the Court has encountered this problem in alternative settings, it has traditionally presumed prejudice for two reasons.

First, certain errors "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658 (collecting cases). For example, where a defendant has been denied counsel or the State has impermissibly interfered with the provision of counsel, the Court has consistently presumed prejudice on the grounds that the "likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *Strickland*, 466 U.S. at 692 ("Prejudice [when counsel is denied or the state interferes with counsel's assistance] is so likely that case-by-case inquiry into prejudice is not worth the cost.").

Second, presuming prejudice is appropriate when an error persists throughout the trial and the particular harms caused by the error are difficult to measure. Determining the amount of prejudice requires courts to establish a baseline in the counterfactual world of adequate assistance. But such analysis is impossible when the defect stems not from some discrete, identifiable error but rather

from the mechanism of the trial itself. The Court presumes prejudice in actual conflict of interest cases for this very reason, explaining that "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692. Indeed, the attempt to calculate prejudice in such situations would necessarily require groundless speculation about unpredictable chains of events. For this reason, "a rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application. . . . [T]o assess the impact . . . would be virtually impossible." *Holloway*, 435 U.S. at 490-91; *see also Glasser v. United States*, 315 U.S. 60, 75-76 (1942) ("To determine the precise degree of prejudice . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

When ineffective assistance of counsel results in structural error, the same concerns of probable prejudice and improbable proof are present. Harm to the defendant is highly likely, if not inevitable. Furthermore, such harm is difficult, if not impossible, to calculate. Structural errors call into question the entire "framework within which the trial proceeds." *Fulminante*, 499 U.S. at 310. Indeed, as this Court has already recognized, once the Constitution's "basic protections"—including the right to a public trial—have been violated, "no criminal punishment may be regarded as fundamentally fair." *Id.* (quoting *Rose*, 478 U.S. at

577-78). Thus, once a structural error has occurred, the defendant is—by definition—prejudiced.

There is a corresponding parallel between the difficulty of measuring the effects of conflicted counsel and structural error. Unlike ordinary trial errors whose "scope is readily identifiable," *Holloway*, 435 U.S. at 490, the harms of enduring structural error and conflicted counsel are not discrete. In the case of conflicted counsel, the error endures throughout the trial and the harms are based less on what counsel has done and more on what counsel has "refrain[ed] from doing." *Id.* at 475 (emphasis omitted). Thus, an investigation into prejudice necessarily involves counterfactual inquiries and "unguided speculation." *Id.* at 491.

Similarly, whereas the harm caused by a trial error may be "quantitatively assessed," structural errors "defy analysis by 'harmless error' standards." *Fulminante*, 499 U.S. at 308-09. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). The closing of the courtroom, particularly during the critically sensitive process of *voir dire*, could have long-reaching and unpredictable effects on the trial. In a public setting, different issues may have been raised; prospective jurors may have been asked different questions; perhaps even the resulting jury panel itself would have been different. If such possibilities sound speculative, it is because they are. But that is precisely the point. To evaluate the effects of counsel's failure to object to the closure of the

courtroom during *voir dire* is to engage in "unguided speculation." *Holloway*, 435 U.S. at 491. If prejudice is not presumed in this situation, no defendant who raises an ineffective assistance of counsel claim based on structural error will be able to succeed. This Catch-22 should have no place in ineffective assistance of counsel jurisprudence.

Respondent would bar Mr. Weaver from relief precisely because his counsel's error was so insidious. Under Respondent's rule, counsel's trial errors can be remedied upon a showing of prejudice. Counsel's structural errors, on the other hand, are functionally permanent, since prejudice is so difficult to prove. Because this Court has held that structural errors generally require automatic reversal while trial errors do not, this paradoxical standard is inappropriate and unjust.

In addition to breeding injustice at the individual level, Respondent's standard would degrade the integrity of the legal profession and decrease public trust in the system as a whole. If defendants' receipt of full structural protections were made to depend on their ability to retain effective counsel, the criminal justice system would appear arbitrary and poorly regulated. After all, criminal defendants are rarely in a position to know, let alone protect, their own rights; they must rely on their lawyers' knowledge and expertise in this area. In order for the legal system to function in a manner worthy of public confidence, important structural protections, such as the right to a public trial, cannot be made to depend on a lawyer's skill or diligence. The system loses its legitimacy if such protections

rest on the luck of the draw with respect to counsel's competence. As the regulators of our own profession, lawyers and judges have the obligation to maintain professional standards that encourage confidence in the system.

C. The Trial Court Can Easily Police the Error.

In the usual case of ineffective assistance of counsel, the trial judge has few realistic opportunities to avert defense counsel's mistakes. The judge may be unaware of counsel's lapse, for example, when the question is whether counsel conducted an adequate investigation. Alternatively, the judge may perceive a potential lapse, but be unable to inquire into whether that "lapse" was strategic because such an investigation would invade the lawyer-client relationship. Structural errors, however, are different. The primary duty for preventing structural errors rests with the court. Moreover, structural errors are easy to observe and police. In circumstances such as these, where the trial court has both the ability and the responsibility to prevent error, this Court has traditionally presumed prejudice.

For example, this Court has presumed prejudice where the right of counsel was denied or interfered with on the grounds that "such circumstances involve impairments of the Sixth Amendment right that are easy to identify and . . . easy for the government to prevent." *Strickland*, 466 U.S. at 692. The Court has reasoned similarly in concurrent conflicts of interest cases: "Given the

obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice . . . ." *Id.* at 692 (internal citation omitted).

As with the denial of counsel and concurrent conflicts of interest, structural errors cannot occur without the awareness and acquiescence of several parties. Judges are well-equipped and constitutionally obligated to guard against structural errors. All structural errors are observable and involve at least the tacit participation of the judge.[3] Moreover, because structural errors are defects in the framework of the trial itself, the prosecutor should also be expected to recognize and address these errors.

Mr. Weaver's case presents one of the rare circumstances in which the principal responsibility for preventing error lies not with defense counsel, but with the trial court. A public official, acting under the judge's supervision, closed the courtroom

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[3] The complete list of structural errors recognized in *Fulminante* includes the "deprivation of the right to counsel . . . the right to self-representation at trial . . . and the right to public trial;" the "unlawful exclusion of members of the defendant's race from a grand jury;" and trial by a "judge who is not impartial." *Fulminante*, 499 U.S. at 309-10. Since *Fulminante*, the Court has added two additional structural errors to the list: denial of the "right to counsel of choice," *Gonzalez-Lopez*, 548 U.S. at 146, and denial of the "right to a jury verdict of guilt beyond a reasonable doubt," *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). None of these errors can occur without the court's knowledge and assent.

during *voir dire*. While a competent lawyer could have—and would have—objected to this closure, Mr. Weaver should not be penalized for his counsel's shortcomings. Where the judge, the prosecutor, and the defense counsel all failed to recognize and prevent clear structural error, there has been a grievous failure of the legal system's self-regulation. "No amount of showing of want of prejudice would cure" this triple failure. *Brookhart*, 384 U.S. at 3 (quoting Brief for Respondent at 33). The fact that the judicial system failed to protect Mr. Weaver in the first instance cannot justify his continued suffering on appeal. In keeping with this Court's precedent and the judiciary's historic role in promoting a legal system that engenders public trust, *amici* urge this Court to presume prejudice in Mr. Weaver's case.

IV. APPLYING A PRESUMPTION OF PREJUDICE WILL NOT CAUSE DEFENSE COUNSEL TO MAKE INTENTIONAL MISTAKES.

The Supreme Judicial Court of Massachusetts expressed concern that if unpreserved structural error could be used as a means to win a new trial, counsel would "harbor error as an appellate parachute." *Commonwealth v. LaChance*, 17 N.E.3d 1101, 1107 (Mass. 2014) (quoting *People v. Vaughn*, 821 N.W.2d 288, 308 (Mich. 2012)). This fear is unfounded. Presuming prejudice will not encourage defense counsel to intentionally create structural errors. First, creating an "appellate parachute" would violate the Rules of Professional Conduct. Second, the trial court can easily prevent structural

error, meaning that lawyers cannot intentionally provide ineffective assistance without the court's acquiescence. Finally, there is no evidence demonstrating the widespread use of this "appellate parachute."

A. Purposeful Failure To Object to Structural Error Violates the Rules of Professional Conduct and Directly Conflicts with Defense Counsel's Interests.

The Model Rules of Professional Conduct create several duties that counsel would violate by intentionally allowing their clients to suffer structural error. Rules in every state and federal district court would prohibit such intentional ineffective assistance of counsel.[4]

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[4] A version of the Model Rules of Professional Conduct has been adopted by forty-nine states and the District of Columbia. *See* Am. Bar Ass'n, *State Adoption of the ABA Model Rules of Professional Conduct*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html. Although not based on the Model Rules, the California Rules of Professional Conduct specially prohibit intentional incompetence. *See* Cal. Rules of Prof'l Conduct r. 3-110 (2015) ("A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. . . . For purposes of this rule, 'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."). Through the adoption of local rules, federal district courts generally apply the Rules of Professional Conduct of the state where they sit.

First, purposefully allowing structural defects would violate defense counsel's obligations of competence and diligence. *See* Model Rules of Prof'l Conduct r. 1.3. In order to act with the required "zeal in advocacy upon the client's behalf," lawyers must object to any structural error at trial. Model Rules of Prof'l Conduct r. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). As Judge Duffly's dissent in *LaChance* observed, "I do not accept the court's assumption that a defendant's trial counsel, who was aware of the removal of the defendant's family members from the court room, would engage in conduct that fails to respect the duty of zealous representation owed to a client." *LaChance*, 17 N.E.3d at 1112 (Duffly, J., dissenting).

It is no response to argue that counsel complies with the mandate of zealous advocacy when he surreptitiously creates "appellate parachutes" for his clients. Such a tactic would still violate the Rules of Professional Conduct. If counsel fails to object to structural error for tactical reasons without consulting with his client, counsel would be usurping a decision that rightfully belongs to his client. According to Model Rule 1.2, lawyers must respect their clients' "decisions concerning the objectives of representation" and must "consult with the client as to the means by which they are to be pursued." Model Rules of Prof'l Conduct r. 1.2. Furthermore, to enable clients to make important decisions about their representation, lawyers have an affirmative obligation to clearly and consistently communicate with their clients. Model Rules of Prof'l Conduct r.

1.4 ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished . . . [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). Certainly, the waiver of the constitutional right to a public trial—the deprivation of which constitutes reversible structural error—would require communication with and approval by the client. By contrast, if the defendant knowingly and voluntarily waives the constitutional right at issue, he cannot later seek a new trial based on either a claim of structural error or ineffective assistance of counsel.

Second, such conduct would violate a lawyer's duties to the court. Withholding an objection to create an "appellate parachute" would "abuse legal procedure[s]," a tactic prohibited by the Model Rules. *See* Model Rules of Prof'l Conduct r. 3.1 cmt. 1 ("The advocate has . . . a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed."). In particular, Model Rule 3.3 requires "Candor Toward the Tribunal." Model Rules of Prof'l Conduct r. 3.3. "This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." Model Rules of Prof'l Conduct r. 3.3 cmt. 2. Purposefully harboring structural error would violate this rule. Similarly, Model Rule 8.4 declares that "it is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Model Rules of Prof'l Conduct r. 8.4; *see also* Model Rules of Prof'l Conduct

pmbl. cmt. 5 ("A lawyer should use the law's procedures only for legitimate purposes . . . .").

A lawyer who willfully permits structural error to permeate a trial would subject himself to discipline, which could include formal reprimand, prohibition against taking on future criminal representations, or disbarment. *See* Model Rules of Prof'l Conduct r. 8.4 cmt. 1. Lawyers in federal court can also be financially penalized for purposefully creating unnecessary appeals. *See* 28 U.S.C. § 1927 (2012) ("Any attorney . . . [who] so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Courts have broad powers to impose discipline on lawyers appearing before them. *See In re Snyder*, 472 U.S. 634, 643 (1985) ("Courts have long recognized an inherent authority to suspend or disbar lawyers. . . . This inherent power derives from the lawyer's role as an officer of the court which granted admission." (internal citations omitted)). Additionally, judges who witness or learn about serious breaches of the Rules of Professional Conduct must refer the offending lawyers to the appropriate disciplinary body. *See* Model Code of Judicial Conduct r. 2.15 (Am. Bar Ass'n 2010).

In addition to risking formal sanctions, lawyers who provide constitutionally ineffective assistance of counsel face high reputational costs. As this Court has recognized, "[I]t is virtually inconceivable that an attorney would deliberately invite the judgment that his performance was

constitutionally deficient in order to win federal collateral review for his client." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

In fact, far greater than the *theoretical* risk that lawyers will intentionally tarnish their reputations for the sake of their clients is the *observed* risk that lawyers will turn against their clients in an attempt to save their reputations. Defense lawyers often vigorously fight against their former clients' ineffective assistance of counsel claims. For example, in *Purkey v. United States*, "[i]n response to [ineffective assistance of counsel] allegations," defense counsel "filed a 117 page affidavit, in which he [went] into extensive detail to refute movant's claims." *Purkey v. United States*, No. 01-00308-01-CR-W-FJG, 2009 WL 3160774, at *2 (W.D. Mo. Sept. 29, 2009), *aff'd*, 729 F.3d 860 (8th Cir. 2013). Similarly, in *Binney v. State*, the former defense counsel gave the Attorney General's Office "petitioner's entire trial file" because he deemed the information "necessary for the defense of his representation." *Binney v. State*, 683 S.E.2d 478, 481 (S.C. 2009). Notably, the lengths to which some lawyers have gone to defend against ineffective assistance of counsel claims recently prompted the ABA Standing Committee on Ethics to issue a formal opinion on the subject. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (addressing the question of "whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may . . . disclose confidential information to government lawyers . . . to help the

prosecution establish that the lawyer's representation was competent").

Thus, the purposeful creation of structural error runs directly contrary to the self-interest of defense lawyers. Because of the strong professional disincentives facing defense counsel, forcing defendants to demonstrate prejudice on appeal adds a procedural bar solely to combat a non-existent problem.

B. Because Judges and Prosecutors Have the Ability and Responsibility To Prevent Structural Defects, Defense Counsel Cannot Unilaterally Create Such Errors.

Structural errors can occur only through the court's tacit participation. Unlike trial errors—whose unconstitutionality may only be apparent with knowledge of facts outside the courtroom—structural errors occur in the presence of the court. Crucially, this means that defense counsel cannot indiscriminately create "appellate parachutes" through structural error; the court has the ultimate power to prevent such defects from undermining the integrity of the trial mechanism.

In fact, it is the judge's affirmative duty to prevent such structural errors. Judges have a responsibility to prevent the deprivation of rights guaranteed by the Sixth Amendment. *See ABA Standards for Criminal Justice: Special Functions of the Trial Judge*, Standard 6-1.1(a) (3d ed. 2000) ("The trial judge has the responsibility for

safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice."). Judges also must ensure that all officers of the court endeavor to preserve the defendant's rights. The Model Code of Judicial Conduct mandates that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." Model Code of Judicial Conduct r. 2.15.

This duty extends to prosecutors as well. The Rules of Professional Conduct make it clear that prosecutors also have an obligation to prevent structural errors from occurring. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Model Rules of Prof'l Conduct r. 3.8 cmt. 1. As a minister of justice, the prosecutor owes the defendant—and the criminal justice system writ large—the "obligation[] to see that the defendant is accorded procedural justice." *Id.*

Thus, an "appellate parachute" cannot result from defense counsel's malfeasance unless the judge and prosecutor are also derelict in their professional duties.[5] Because intentional structural errors only result from the simultaneous wrongdoing of defense counsel, judges, and prosecutors, they should not be

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[5] Recent cases where this Court has addressed intentional defense counsel mistakes do not involve structural error, so they are distinguishable from the case at bar. *See, e.g., Puckett v. United States*, 556 U.S. 129, 133 (2009) (distinguishing failure to object to the violation of a plea agreement from cases involving structural error).

a serious concern. Trial courts, in effect, set the outer limit on the number of structural errors that defense counsel can make.

C. There Is No Evidence To Support the Conjecture that Lawyers Would Intentionally Harbor Error.

Defense counsels' use of "appellate parachutes" has not, and will never, run rampant. Under longstanding precedent, courts must inquire whether a lawyer's purported mistake instead resulted from a strategic decision. *See Strickland*, 466 U.S. at 689 (explaining that judges must give counsel "wide latitude . . . in making tactical decisions"). If a court determines that a lawyer intentionally failed to object to structural error, the defendant cannot make an ineffective assistance of counsel claim. Furthermore, the Model Rules of Professional Conduct would require a lawyer to be honest if questioned about whether his ineffective assistance of counsel was tactical. Model Rules of Prof'l Conduct r. 3.3 ("A lawyer shall not knowingly . . . make a false statement of fact . . . to a tribunal."). Having to admit that his deficient representation was tactical would prevent any gain from using such a strategy in the first place.

Accordingly, the potential benefit of a tactical mistake to the defendant is nil, while the potential cost to the defendant's lawyer is extremely high. Thus, as Justice Brennan observed, the fear of intentional error "is without basis" because "no rational lawyer would risk the 'sandbagging' feared by the Court." *Wainwright v. Sykes*, 433 U.S. 72,

102-03 (1977) (Brennan, J., dissenting). Indeed, Justice Brennan noted that "the Court points to no cases or commentary arising during the past 15 years" that support such a concern. *Id.* at 102. *Amici* are aware of no empirical studies controverting Justice Brennan's claim that have emerged in the intervening decades. In fact, four circuit courts and two state courts[6] have adopted a presumption of prejudice when ineffective assistance results in structural error with no apparent deleterious effects.

The "appellate parachute" is not a common occurrence, but in the few cases where it is unclear whether such a tactic has been used, granting defendants a new trial is far better than the alternative. However this Court decides to treat structural defects resulting from ineffective assistance of counsel, some "error" is inevitable. Either courts will grant a new trial based on the occasional *intentional* mistake, or courts will deny relief after *unintentional* mistakes. Equity clearly favors choosing the first option. Some party must bear the risk of structural error, but defendants should not bear all of it. Giving the benefit of the doubt to the defendant does not mean that a guilty man will go free; it simply means that the defendant will have the opportunity to vindicate his constitutional right to a fair trial. There are many checks preventing the widespread use of "appellate

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[6] *See Winston v. Boatwright*, 649 F.3d 618 (7th Cir. 2011); *Johnson v. Sherry*, 586 F.3d 439 (6th Cir. 2009); *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007); *McGurk v. Stenberg*, 163 F.3d 470, 475 (8th Cir. 1998); *Littlejohn v. United States*, 73 A.3d 1034 (D.C. 2013); *Montana v. Lamere*, 112 P.3d 1005 (Mont. 2005).

parachutes," and the responsibility of the courts to protect defendants' Sixth Amendment rights outweighs the risk that this practice may be used in a small minority of cases.

CONCLUSION

The crucial importance of safeguarding the public's trust in the justice system requires the legal profession to take seriously its professional duties to render effective assistance of counsel. This duty could not be more important than when a defendant's liberty is at stake. For the foregoing reasons, *amici* respectfully urge that the decision of the Supreme Judicial Court of Massachusetts be reversed.

Respectfully submitted,

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APPENDIX A

IDENTIY OF *AMICI CURIAE*[1]

Institutional *Amici*

The **Monroe H. Freedman Institute for the Study of Legal Ethics** at Hofstra University's Maurice A. Deane School of Law serves as a research center for the study of legal ethics. The Freedman Institute sponsors programs and conferences for scholarly inquiry and trains law students to take responsibility for serving others. The Freedman Institute seeks to focus the attention of law students, scholars, judges, and practitioners on today's most significant issues for the legal profession.

The **National Association for Public Defense** (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories, including all staff providing legal representation through the Massachusetts Committee for Public Counsel Services (CPCS) as well as assigned counsel in the Commonwealth. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in theoretical best practices as well as in the practical, day-to-day delivery of services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel

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[1] The affiliations of the various *amici* are for identification purposes only, and the views expressed in this brief do not necessarily reflect the views of any associated institutions.

delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members on the importance of providing vigorous defense advocacy in all phases of litigation, including preservation of trial error to secure the most optimal standard of review during any appellate or post-conviction phase of a case.

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